

***UNITED STATES – MEASURES AFFECTING IMPORTS OF  
CERTAIN PASSENGER VEHICLE AND LIGHT TRUCK TYRES FROM CHINA***

**(WT/DS399)**

**FIRST WRITTEN SUBMISSION OF  
THE UNITED STATES OF AMERICA**

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<i>Argentina – Footwear (Panel)</i>	Panel Report, <i>Argentina – Measures Affecting Imports of Footwear, Textiles Apparel and Other Items</i> , WT/DS56/R, adopted 22 April 1998, as modified by the Appellate Body Report, WT/DS56/AB/R
<i>Argentina – Footwear (AB)</i>	Appellate Body Report, <i>Argentina – Measures Affecting Imports of Footwear, Textiles Apparel and Other Items</i> , WT/DS56/AB/R and Corr.1, adopted 22 April 1998
<i>China – Auto Parts (Panel)</i>	Panel Report, <i>China – Measures Affecting Imports of Automobile Parts</i> WT/DS339/R, WT/DS340/R, WT/DS340/R, and Add.1 and Add.2, adopted 12 January 2009, as modified by the Appellate Body Report, WT/DS339/AB/R, WT/DS340/AB/R, WT/DS340/AB/R
<i>China – Auto Parts (AB)</i>	Appellate Body Report, <i>China – Measures Affecting Imports of Automobile Parts</i> WT/DS339/AB/R, WT/DS340/AB/R, WT/DS340/AB/R, adopted 12 January 2009
<i>China – Publications and Audiovisual Products (Panel)</i>	Panel Report, <i>China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products</i> , WT/DS363/R, adopted 19 January 2010, as modified by the Appellate Body Report, WT/DS363/AB/R
<i>EC – DRAMS</i>	Panel Report, <i>European Communities – Countervailing Measures on Dynamic Random Access Memory Chips from Korea</i> , WT/DS299/R, adopted 3 August 2005
<i>EC – Hormones (AB)</i>	Appellate Body Report, <i>European Communities – Measures Concerning Meat and Meat Products (Hormones)</i> , WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998
<i>EEC – Parts and Components</i>	GATT Panel Report, <i>EEC – Regulations on Imports of Parts and Components</i> , BISD 37S/132, adopted 16 May 1990
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<i>US – Corrosion-Resistant Steel Sunset Review (AB)</i>	Appellate Body Report, <i>United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan</i> , WT/DS244/AB/R, adopted 9 January 2004
<i>US – Cotton Yarn (Panel)</i>	Panel Report, <i>United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan</i> , WT/DS192/R, adopted 5 November 2001, as modified by the Appellate Body Report, WT/DS192/AB/R
<i>US – Cotton Yarn (AB)</i>	Appellate Body Report, <i>United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan</i> , WT/DS192/AB/R, adopted 5 November 2001
<i>US – DRAMS CVD (Panel)</i>	Panel Report, <i>United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMs) from Korea</i> , WT/DS296/R, adopted 20 July 2005, as modified by the Appellate Body Report, WT/DS296/AB/R

<i>US – DRAMS CVD (AB)</i>	Appellate Body Report, <i>United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea</i> , WT/DS296/AB/R, adopted 20 July 2005
<i>US – Fur Hats</i>	GATT Panel Report, <i>Report on the Withdrawal by the United States of a Tariff Concession under Article XIX of the General Agreement on Tariffs and Trade</i> , GATT/CP/106, adopted 22 October 1951
<i>US – German Steel (Panel)</i>	Panel Report, <i>United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany</i> , WT/DS213/R and Corr.1, adopted 19 December 2002, as modified by the Appellate Body Report, WT/DS213/AB/R
<i>US – German Steel (AB)</i>	Appellate Body Report, <i>United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany</i> , WT/DS213/AB/R, adopted 19 December 2002
<i>US – Hot-Rolled Steel (Panel)</i>	Panel Report, <i>United States – Anti-dumping Measures on Certain Hot-Rolled Steel Products from Japan</i> , WT/DS184/AB/R, adopted 23 August 2001, as modified by the Appellate Body Report, WT/DS184/AB/R
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<i>US – Line Pipe (Panel)</i>	Panel Report, <i>United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea</i> , WT/DS202/R, adopted 8 March 2002, as modified by the Appellate Body Report, WT/DS202/AB/R
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<i>US – Shirts and Blouses (AB)</i>	Appellate Body Report, <i>United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India</i> , WT/DS33/AB/R, adopted 23 May 1997, and Corr. 1



<p><i>US – Softwood Lumber ITC Investigation (Article 21.5) (AB)</i></p>	<p>Appellate Body Report, <i>United States – Investigation of the International Trade Commission in Softwood Lumber From Canada – Recourse to Article 21.5 of the DSU by Canada</i>, WT/DS277/AB/RW, adopted 9 May 2006, and Corr.1</p>
<p><i>US – Steel Safeguards (Panel)</i></p>	<p>Panel Report, <i>United States – Definitive Safeguard Measures on Imports of Certain Steel Products</i>, WT/DS248/R, WT/DS249/R, WT/DS251/R, WT/DS252/R, WT/DS253/R, WT/DS254/R, WT/DS258/R, WT/DS259/R, adopted 10 December 2003, as modified by the Appellate Body Report, WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R and Corr.1</p>
<p><i>US – Steel Safeguards (AB)</i></p>	<p>Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Certain Steel Products</i>, WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, and Corr.1, adopted 10 December 2003</p>
<p><i>US – Superfund</i></p>	<p>GATT Panel Report, <i>United States – Taxes on Petroleum and Certain Imported Substances</i>, BISD 34S/136, adopted 17 June 1987</p>
<p><i>US– Wheat Gluten (Panel)</i></p>	<p>Panel Report, <i>United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities</i>, WT/DS166/R, adopted 19 January 2001, as modified by the Appellate Body Report, WT/DS166/AB/R</p>
<p><i>US – Wheat Gluten (AB)</i></p>	<p>Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities</i>, WT/DS166/AB/R, adopted 19 January 2001</p>

## List of Exhibits

Exhibit US-	Title
1	U.S. International Trade Commission, Certain Passenger Vehicle and Light Truck Tires from China, Investigation No. TA-421-7, Publication 4085 (July 2009)
2	Petition filed by the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (“USW”), dated April 20, 2009 (Excerpts)
3	Section 421 - 423 of the Trade Act of 1974, as amended (19 U.S.C. 2451 et. seq.)
4	Notice of Proposed Measure and Opportunity for Public Comment Pursuant to Section 421 of the Trade Act of 1974: Certain Passenger Vehicle and Light Truck Tires from the People’s Republic of China (74 Fed. Reg. 34387)
5	U.S. Trade Representative, Transcript of TPSC Hearing on Certain Passenger Vehicle and Light Truck Tires from China, August 7, 2009 (Excerpt)
6	Presidential Determination No. 2009-28 of September 11, 2009 (74 Fed. Reg. 47433-47434, September 16, 2009)
7	Proclamation 8414 of September 11, 2009 (74 Fed. Reg. 47861-47863, September 17, 2009)
8	<i>Circular Welded Non-alloy Steel Pipe from China</i> , Inv. No. TA-421-6, USITC Pub. 3807 (October 2005) (Excerpts)
9	<i>Certain Steel Wire Garment Hangers from China</i> , Inv. No. TA-421-2, USITC Pub. 3575 (Feb. 2003) (Excerpts)
10	<i>Uncovered Innerspring Units from China</i> , Inv. No. TA-421-5, USITC Pub. 3676 (March 2004) (Excerpts)
11	Time Lapses Between Filing of Petition and End of Quarter Data in Other Section 421 Investigations
12	<i>Oil Country Tubular Goods from China</i> , Inv. Nos. 701-TA-463 and 731-TA-1159 (Preliminary), USITC Pub. 4081 (Excerpts)
13	Time Lapses Between Filing of Petition and End of Quarter Data in Antidumping and Countervailing Duty Preliminary Investigations in 2009

14	Antidumping Duty Preliminary Investigations Where Petition Was Filed More Than 20 Days After End of Quarter and Interim Data Was Not Collected For That Quarter
15	<i>Pedestal Actuators from China</i> , Inv. No. TA-421-1, USITC Pub. 3557 (Nov. 2002) (Excerpts)
16	<i>Certain Ductile Iron Waterworks Fittings from China</i> , Inv. No. TA-421-4, USITC Pub. 3657 (Dec. 2003) (Excerpts)
17	<i>Certain Brake Drums and Rotors From China</i> , Inv. No-TA-421-3, USITC Pub. 3622 (Aug. 2003) (Excerpts)
18	Posthearing Brief of USW, dated June 9, 2009, Exhibit 26 (Modern Tire Dealer Article, “China and You: Expect More Tire Imports in the Years to Come”)
19	Prehearing Brief of USW, dated May 29, 2009, Exhibit 18 (Supplier Business, “The Tire Report”)
20	U.S. International Trade Commission Staff Remedy Memorandum, Investigation No. TA-421-7, June 19, 2009

## I. INTRODUCTION

1. Over a five-year period from 2004-2008, imports of tires from China into the United States more than tripled, from 14.6 million tires to 46 million. As a result of this rapid growth, there was a concomitant decline in nearly all of the economic indicators for the U.S. tire industry. Because WTO Members anticipated that this kind of development might arise following China's accession to the WTO, they negotiated a transitional product-specific safeguard mechanism ("the transitional mechanism"), contained in paragraph 16 of the *Protocol on the Accession of the People's Republic of China* ("Protocol of Accession")<sup>1</sup>.

2. In negotiating the appropriate balance of rights and obligations in the context of China's accession, WTO Members recognized the "significant size, rapid growth and transitional nature of the Chinese economy."<sup>2</sup> China's economy also had "special features"<sup>3</sup> as China "was continuing the process of transition towards a full market economy."<sup>4</sup> Working Party members concluded that a pragmatic approach had to be taken. This pragmatic approach is reflected throughout China's Protocol of Accession and the accompanying Working Party Report. China was permitted to phase in many of its obligations and WTO Members in turn were accorded various temporary trade remedy protections.<sup>5</sup>

3. The transitional mechanism is an integral part of the accession package negotiated and accepted by WTO Members and China. The United States invoked this mechanism to deal with the rapid increase of imports of tires from China. Now, in an attempt to escape the imposition of a measure under the mechanism, China argues that it is something entirely different than what WTO Members actually negotiated and agreed as part of the bargain.

4. By virtue of its inclusion in the Protocol, the transitional mechanism is integral to the WTO Agreement and therefore part of a covered agreement. Like any other provision of a covered agreement, it has to be interpreted according to the customary rules of treaty interpretation. The transitional mechanism must be read according to the ordinary meaning of the text, in the light of its context. Throughout its submission, China argues that the standards set out in the text of the transitional mechanism must be interpreted so as to be both more "demanding" than what the text's ordinary meaning would indicate, and "more demanding" than the standards applicable to a global safeguard measure imposed under the *WTO Agreement on*

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<sup>1</sup> WT/L/432 (November 23, 2001).

<sup>2</sup> Report of the Working Party to the Accession of China ("Working Party Report"), WT/ACC/CHN/49 (1 October 2001, para. 9).

<sup>3</sup> Working Party Report, para. 171.

<sup>4</sup> Working Party Report, para. 150.

<sup>5</sup> In addition to the transitional product-specific safeguard mechanism, the Protocol of Accession also contained a temporary textiles-specific safeguard (Working Party Report, paras. 241-242), temporary special antidumping methodologies (Protocol of Accession, para. 15(a)), and special countervailing duty methodologies (Protocol of Accession, paras. 10.2, 15(b)). The Protocol of Accession also includes a temporary Transitional Review Mechanism (Protocol of Accession, para. 18), which allows Members to conduct special annual reviews of China's implementation of its WTO commitments.

*Safeguards* (“Safeguards Agreement”). The text of the transitional mechanism, when properly interpreted in light of its context, does not support this.

5. The United States will demonstrate in this submission, that it has met the obligations it undertook as a WTO Member when it negotiated the transitional mechanism as part of the bargain of China’s accession to the WTO. We will demonstrate that the plain text of paragraph 16 does not support China’s arguments, through which China would set the standards for use of this transitional mechanism so high – higher even than for a global safeguard – so that no WTO Member could ever have recourse to it.<sup>6</sup> In addition, the United States will demonstrate that the U.S. law implementing the transitional mechanism is fully consistent with that mechanism, properly interpreted, that the rigorous and detailed investigation undertaken by the ITC fully complied with the requirements of the Protocol, and that the remedy imposed is therefore in accordance with the Protocol.

## II. PROCEDURAL BACKGROUND

6. On September 14, 2009, China requested consultations with the United States pursuant to Articles 1 and 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (“DSU”), Article XXIII:1 of the *General Agreement on Tariffs and Trade* (“GATT 1994”), and Article 14 of the Safeguards Agreement. In its request, China alleged that the additional duties on certain passenger vehicle and light truck tires from China imposed by the United States under the transitional mechanism are inconsistent with Article I:1 of the GATT 1994 and paragraphs 16.1, 16.3, 16.4, and 16.6 of the Protocol of Accession. In addition, China alleged that the definition of “significant cause” in the U.S. statute implementing the transitional mechanism is “as such” inconsistent with paragraph 16.4 of the Protocol of Accession.<sup>7</sup>

7. The Parties held consultations in Geneva on November 9, 2009, but failed to settle the dispute. China requested the establishment of a panel on December 9, 2009.<sup>8</sup> The Dispute Settlement Body established the panel on January 19, 2009 and the Director-General composed the panel on March 12, 2010.<sup>9</sup>

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<sup>6</sup> In this regard, we note that the United States is not the first WTO Member to avail itself of this mechanism. At least six other WTO Members have availed themselves of the right to do so and imposed measures under it.

<sup>7</sup> Request for Consultations by China, WT/DS399/1, G/L/893, G/SG/D36/1 (16 September 2009).

<sup>8</sup> Request for the Establishment of a Panel by China, WT/DS399/2 (11 December 2009).

<sup>9</sup> Constitution of the Panel Established at the Request of China, WT/DS399/3 (16 March 2010).

### III. FACTUAL BACKGROUND<sup>10</sup>

8. Paragraph 16 of the Protocol provides a transitional mechanism under which WTO Members may impose a remedy against rapidly increasing imports from China whenever those imports are a significant cause of material injury or threat of material injury to an industry. That is the situation the United States faced with regard to imports of Chinese tires.

9. During the period covered by the ITC's investigation, the Chinese industry producing passenger vehicle and light truck tires grew at an extremely rapid rate, with its overall capacity more than doubling during the period.<sup>11</sup> China's exports of these tires also grew rapidly during the period, more than doubling between 2004 and 2008. Additionally, Chinese producers shipped an increasingly large percentage of their exports to the United States.<sup>12</sup>

10. As a result of the Chinese industry's growth and its focus on exports, China greatly increased its share of the U.S. market and took significant market share directly from the U.S. industry between 2004 and 2008.<sup>13</sup> As the quantity of imports from China increased by 215 percent during this period, the industry's capacity, production, capacity utilization, domestic shipment, net sales quantities, market share, gross profits, operating income and employment and hours worked levels all declined substantially. Between 2004 and 2008, the U.S. industry's capacity fell by 17.8 percent, its production quantities fell by 26.6 percent, its capacity utilization fell by 10.3 percentage points, its domestic shipment quantities fell by 29.7 percent, its net sales quantities fell by 28.3 percent, and its market share fell by 13.7 percent, in quantity terms.<sup>14</sup> Similarly, the U.S. industry's gross profits fell by 33.6 percent, its operating income margins fell by 4.8 percent, the number of its production workers fell by 14.2 percent, and the number of hours worked fell by 17.0 percent between 2004 and 2008.<sup>15</sup>

11. Given these trends, the ITC reasonably concluded that rapidly increasing imports of tires from China were a significant cause of material injury or threat of material injury to the industry and were therefore causing market disruption in the U.S. tires market.

#### A. The Growth of the Chinese Industry and the Condition of the U.S. Industry

12. In the late 1990's, the Chinese tire industry began to expand and modernize, beginning

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<sup>10</sup> The ITC investigation at issue in this dispute is Investigation No. TA-421-7, *Certain Passenger Vehicle and Light Truck Tires from China*. The ITC's determination and report on this investigation can be found in Publication 4085 of July 2009 ("ITC Report"). Exhibit US-1.

<sup>11</sup> ITC Report, p. 25 and Table IV-3. Exhibit US-1.

<sup>12</sup> ITC Report, Table IV-3. Exhibit US-1.

<sup>13</sup> ITC Report, pp. 11 - 12 and 22 - 23. Exhibit US-1.

<sup>14</sup> ITC Report, Table C-1. Exhibit US-1.

<sup>15</sup> ITC Report, pp. 14 - 18 and 20 - 29. Exhibit US-1.

with the purchase of state-of-the-art equipment from European manufacturers.<sup>16</sup> By 2004, the first year covered by the ITC's period of investigation, China's passenger and light truck tires industry had a total production capacity of 93.2 million tires and total production of 83.7 million tires, less than half the size of the U.S. industry in 2004 in terms of production and capacity.<sup>17</sup>

13. Within three years, however, the situation changed dramatically. By 2007, the industry in China more than doubled in size and became larger than the U.S. tire industry.<sup>18</sup> From 2004 to 2007, the capacity levels of the Chinese tire industry exploded, increasing from 93.2 million tires in 2004 to 201.8 million tires in 2007, a growth of more than 116 percent.<sup>19</sup> The Chinese industry's production followed suit, with its production increasing to 182 million tires, a growth of 174 percent between 2004 and 2007.<sup>20</sup>

14. The industry in China continued its extraordinary growth in 2008, the last year of the ITC's period of investigation. In that year, China's production capacity grew to 235.2 million tires, representing an additional increase of 16.5 percent.<sup>21</sup> Its production quantities also grew, increasing by an additional 7.5 percent to 195.6 million tires.<sup>22</sup> Moreover, the Chinese producers projected that their capacity levels would grow to 258.4 million tires in 2009 and 272.6 million tires in 2010, and their production levels would grow to 217.8 million tires in 2009 and 236.6 million tires in 2010.<sup>23</sup>

15. As the Chinese industry grew between 2004 and 2008, it continued to rely heavily on export markets as an outlet for its growing production levels. On an absolute level, the volume of China's exports nearly tripled between 2004 and 2008, growing from 43.9 million tires in 2004 to 118.3 million tires in 2008.<sup>24</sup> Moreover, between 2004 and 2008, an increasingly large percentage of the industry's overall shipments went to export markets. China's export shipments increased from 52.0 percent of total shipments in 2004 to 59.5 percent of total shipments in 2008.<sup>25</sup> Like its production and capacity levels, the industry in China projected that total export

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<sup>16</sup> ITC Report, p. 26 and n. 26. Exhibit US-1.

<sup>17</sup> ITC Report, Table IV-3. Exhibit US-1.

<sup>18</sup> ITC Report, Table IV-3. Exhibit US-1.

<sup>19</sup> ITC Report, Table IV-3. Exhibit US-1.

<sup>20</sup> ITC Report, Table IV-3. The industry's production levels grew from 83.7 million tires in 2004 to 182 million tires in 2007. *Id.* Exhibit US-1.

<sup>21</sup> ITC Report, Table IV-3. Exhibit US-1.

<sup>22</sup> ITC Report, Table IV-3. Exhibit US-1.

<sup>23</sup> ITC Report, Table IV-3. Exhibit US-1.

<sup>24</sup> ITC Report, Table IV-3. Exhibit US-1.

<sup>25</sup> ITC Report, Table IV-3. Exhibit US-1. The record indicated that, in some instances, China requires new plants to export much or all of their Chinese tire production for a period of time as a condition for operating a plant in China. ITC Report, p. 34, n.190 (Cooper reported that it was required to export all tires at its Kushan plant in China for a period of five years after beginning that operation).

shipments would continue to grow significantly in 2009 and 2010.<sup>26</sup>

16. During this period of rapid growth, the Chinese industry continued to focus its export efforts on the U.S. market. Between 2004 and 2008, the United States remained the most important export market, by far, for the industry in China.<sup>27</sup> Moreover, Chinese exporters shipped an increasingly large percentage of their exports to the United States, with those exports increasing from 32.1 percent of total export shipments in 2004 to 40.4 percent of total export shipments in 2008.<sup>28</sup>

17. Because the Chinese industry focused increasingly on the U.S. market during the period, the quantity of imports of tires from China into the U.S. market rapidly increased between 2004 and 2008.<sup>29</sup> During that period, the quantity of U.S. imports of tires from China grew by 215 percent, increasing from 14.6 million tires in 2004 to 45.97 million tires in 2008.<sup>30</sup> Moreover, the imports from China more than tripled their share of the U.S. market between 2004 and 2008, with their share of the market growing from 4.7 percent in 2004 to 16.7 percent in 2008.<sup>31</sup>

18. In fact, the two largest year-to-year increases in the relative volumes of Chinese imports occurred during 2007 and 2008, the last two years of the period of investigation.<sup>32</sup> The rapid growth in imports from China continued in 2008, when imports of subject tires from China rose by more than 10 percent from their 2007 levels, even though apparent U.S. consumption declined by 6.9 percent in that year.<sup>33</sup> This rapid increase in the volume of subject imports was accompanied by consistent and significant underselling.<sup>34</sup>

19. At the same time that tires imports from China were entering the market in rapidly growing volumes, virtually all the indicators of the U.S. tire industry's conditions were falling. Nearly all these indicators were at their lowest level in the final year of the period.<sup>35</sup> Specifically, the industry's production of tires decreased throughout the period, falling by 26.6 percent

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<sup>26</sup> ITC Report, Table IV-3. Exhibit US-1.

<sup>27</sup> ITC Report, Table IV-4. Exhibit US-1.

<sup>28</sup> ITC Report, Table IV-3. Exhibit US-1.

<sup>29</sup> ITC Report, Table II-1. Exhibit US-1.

<sup>30</sup> ITC Report, Table II-1. Exhibit US-1.

<sup>31</sup> ITC Report, Table C-1. Exhibit US-1.

<sup>32</sup> ITC Report, p. 12. Exhibit US-1.

<sup>33</sup> ITC Report, Table V-1. Exhibit US-1.

<sup>34</sup> Imports from China undersold U.S.-made tires in 119 of the 120 instances in which the ITC was able to make a comparison. ITC Report, Tables V-9 to V-17. Exhibit US-1. The ITC uses the term "underselling" in its analysis to refer to price "undercutting."

<sup>35</sup> ITC Report, Table C-1. Exhibit US-1.



between 2004 and 2008, with more than a third of this overall decline occurring in 2008.<sup>36</sup> Similarly, the U.S. industry's capacity levels and capacity utilization rates fell considerably during the period of investigation, with the industry's capacity levels declining by 17.8 percent between 2004 and 2008 and its capacity utilization rates declining by 10.3 percentage points during that same period.<sup>37</sup>

20. U.S. industry net sales and U.S. shipment quantities also declined considerably between 2004 and 2008.<sup>38</sup> Specifically, the U.S. industry's domestic shipments of tires fell by 29.7 percent between 2004 and 2008, with the largest percentage decline occurring in 2008, when Chinese import volume was at its highest.<sup>39</sup> Similarly, the net sales quantities of the industry declined by 28.3 percent between 2004 and 2008, with the largest single percentage decline occurring again in 2008, the final year of the period.<sup>40</sup> Finally, the U.S. industry's employment indicators all fell at significant rates during the period. The number of the industry's production workers fell by 14.2 percent, hours worked fell by 17 percent, and wages paid fell by 12.5 percent.<sup>41</sup>

21. Finally, at the same time that imports from China were consistently underselling U.S.-made tires, the U.S. industry's profitability levels deteriorated considerably. The industry's gross profits fell by 33.6 percent and its operating income margins fell by 4.8 percentage points between 2004 and 2008.<sup>42</sup> Moreover, the industry's gross profit and operating income levels and its operating income margin fell to their worst levels in 2008, the final year of the period of investigation, when subject import volumes were at their highest.<sup>43</sup> In that year, the industry as a whole operated at a significant loss and six of the reporting firms indicated that they operated at a loss on their tire operations.<sup>44</sup> The industry's poor profitability levels in 2008 reflected a sharp decline from the industry's modest operating profit in 2007, when three of the reporting firms reported an operating loss for the year.<sup>45</sup>

22. Finally, U.S. producers announced the closure of three plants in 2006 and one plant in 2007, representing an aggregate operating capacity of 43.4 million tires.<sup>46</sup> Furthermore, U.S.

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<sup>36</sup> ITC Report, Table C-1. Exhibit US-1.

<sup>37</sup> ITC Report, Table C-1. Exhibit US-1.

<sup>38</sup> ITC Report, Table C-1. Exhibit US-1.

<sup>39</sup> ITC Report, Table C-1. Exhibit US-1.

<sup>40</sup> ITC Report, Table C-1. Exhibit US-1.

<sup>41</sup> ITC Report, Table C-1. Exhibit US-1.

<sup>42</sup> ITC Report, Table C-1. Exhibit US-1.

<sup>43</sup> ITC Report, Table C-1. Exhibit US-1.

<sup>44</sup> ITC Report, Table III-5. Exhibit US-1.

<sup>45</sup> ITC Report, Table III-5. Exhibit US-1.

<sup>46</sup> ITC Report, Table I-3. Exhibit US-1.

producers announced in late 2008 and early 2009 that they would close three more plants during 2009, with an aggregate operating capacity of 22.5 million tires.<sup>47</sup>

## **B. The ITC's Injury Investigation**

23. On April 20, 2009, the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (“USW”)<sup>48</sup> filed a petition with the ITC pursuant to the provisions of the statute implementing the transitional mechanism in U.S. law.<sup>49</sup> The petition alleged that imports of passenger vehicle and light truck tires from China were being imported in such increased quantities or under such conditions as to cause or threaten to cause market disruption to the domestic producers of a like or directly competitive product.<sup>50</sup>

24. On April 24, 2009, the ITC instituted an investigation to determine whether the subject tires from China were being imported in the United States in such increased quantities or under such conditions as to cause or threaten to cause market disruption to the domestic producers of like or directly competitive products.<sup>51</sup> On April 29, 2009, the ITC published notice of the institution of the investigation in the *Federal Register*, the official journal of the United States Government.<sup>52</sup> In the notice, the ITC set forth the schedule for the proceeding, including the date for its public hearing and the deadlines for any applicable filings, including briefs.<sup>53</sup>

25. The ITC sent questionnaires to all known domestic producers, importers, and Chinese producers of passenger vehicle and light truck tires. It received responses from 10 firms accounting for virtually all of U.S. production of tires in 2008.<sup>54</sup> The ITC also sent questionnaires to 44 firms believed to be U.S. importers of subject tires and received responses from 35 firms that accounted for the great majority of total U.S. imports from China between 2004 and 2008.<sup>55</sup> The ITC also sent foreign producer questionnaires to 75 firms believed to account for 85 percent of total exports of the subject tires between 2004 and 2008 and received

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<sup>47</sup> ITC Report, Table I-3. Exhibit US-1.

<sup>48</sup> The USW represents workers in 13 domestic plants producing passenger vehicle and light truck tires. These plants accounted for more than 46 percent of the U.S. industry's capacity to produce passenger vehicle and light truck tires. Petition, p 5. Exhibit US-2.

<sup>49</sup> The transitional mechanism is implemented in U.S. law through Section 421 - 423 of the Trade Act of 1974, as amended, commonly referred to as “Section 421”. It is codified at 19 U.S.C. § 2451, 2451a, 2451b. Exhibit US-3.

<sup>50</sup> ITC Report, p. I-1. Exhibit US-1.

<sup>51</sup> 74 Fed. Reg. 19593 (Apr. 29, 2009) (attached in ITC Report, Appendix A). Exhibit US-1.

<sup>52</sup> 74 Fed. Reg. 19593 (Apr. 29, 2009) (attached in ITC Report, Appendix A). Exhibit US-1.

<sup>53</sup> 74 Fed. Reg. 19593 (Apr. 29, 2009) (attached in ITC Report, Appendix A). Exhibit US-1.

<sup>54</sup> ITC Report, p. II-1. Exhibit US-1.

<sup>55</sup> ITC Report, p. II-1. Exhibit US-1.

responses from 36 of these firms.<sup>56</sup>

26. During the investigation, the ITC also sent a supplemental questionnaire to U.S. producers of tires and importers of subject tires to gather additional information about the existence of segments or product categories in the market. The ITC asked these parties to state whether they believed these segment or categories existed and, if so, whether the U.S. market for subject tires shifted between the three categories between 2004 and 2008. The ITC received supplemental questionnaire responses from all U.S. producers and 25 of the largest importers.<sup>75</sup>

27. On June 2, 2009, the ITC held a public hearing on the issues of market disruption and remedy.<sup>58</sup> The ITC allowed all persons with an interest in the matter to appear, make presentations, and question other parties at the hearing. The petitioner and several groups of persons representing Chinese producers and U.S. importers of the subject tires participated and provided testimony at the hearing.<sup>59</sup>

28. The ITC permitted parties to file prehearing and post-hearing briefs addressing legal and factual issues in the investigation.<sup>60</sup> The parties filed pre-hearing briefs with the Commission on May 28, 2009 and post-hearing briefs on June 8, 2009. Final comments on market disruption were due on June 16, 2009.<sup>61</sup> The ITC also allowed any other person with an interest in the investigation to file written comments by June 8, 2009.<sup>26</sup>

### **C. The ITC's Injury Determination**

29. On June 19, 2009, after undertaking a comprehensive investigation, the ITC held a public meeting to vote on the issue of market disruption.<sup>63</sup> By a vote of 4-2, the ITC issued an affirmative determination of market disruption, concluding that passenger vehicle and light truck tires from China were being imported into the United States in such increased quantities or under such conditions as to cause market disruption to the domestic producers of like or directly competitive products.<sup>64</sup>

30. In its report on this determination, which was issued on July 9, 2009, the ITC conducted a

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<sup>56</sup> ITC Report, p. IV-1. Exhibit US-1.

<sup>57</sup> ITC Report, p. V-5. Exhibit US-1.

<sup>58</sup> ITC Report, p. I-1. Exhibit US-1.

<sup>59</sup> ITC Report, Appendix B. Exhibit US-1.

<sup>60</sup> ITC Notice of Investigation, ITC Report, Appendix A. Exhibit US-1.

<sup>61</sup> ITC Notice of Investigation, ITC Report, Appendix A. Exhibit US-1.

<sup>62</sup> ITC Notice of Investigation, ITC Report, Appendix A. Exhibit US-1.

<sup>63</sup> ITC Report, p. I-1. Exhibit US-1.

<sup>64</sup> ITC Report, p. 1. Exhibit US-1.

thorough and objective analysis of the record and concluded that rapidly increasing imports of passenger vehicle and light truck tires from China were a significant cause of material injury to the domestic industry.<sup>65</sup>

### **1. Imports of Tires from China were Rapidly Increasing in Absolute and Relative Terms**

31. The ITC first concluded that imports of such tires from China were rapidly increasing during the period of investigation.<sup>66</sup> After noting that it “focused on recent increases in imports,”<sup>67</sup> the ITC found that the subject imports from China were increasing rapidly in both absolute and relative terms.<sup>68</sup> The ITC found that the absolute quantities of the subject imports increased in each year of the period, and were at their highest levels of the period in 2008.<sup>69</sup> As the ITC pointed out, the quantity of the subject imports increased by 215.5 percent between 2004 and 2008, by 53.7 percent between 2006 and 2007, and by an additional 10.8 percent in 2008, the last year of the period of investigation.<sup>70</sup>

32. The ITC also found that the ratios of subject imports to U.S. production and to U.S. consumption increased throughout the period of investigation, and that both ratios were at their highest levels in 2008.<sup>71</sup> More specifically, the ratio of the subject import to U.S. production increased by 22 percentage points during the period of investigation, with the two largest year-to-year increases occurring in 2007 and 2008, the final two years of the period.<sup>72</sup> The market share of the subject imports increased by 12 percentage points between 2004 and 2008, with the two largest year-to-year increases occurring in 2007 and 2008.<sup>73</sup>

33. Furthermore, the ITC addressed and rejected the argument of the respondents that the increases in the subject imports were “small” or “gradual” and had “abated” by the end of the period.<sup>74</sup> Noting that the subject imports increased on both an absolute and relative level throughout the period and were at their highest levels in 2008, the final year of the period, the ITC stated that:

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<sup>65</sup> ITC Report, pp. 22-29. Exhibit US-1.

<sup>66</sup> ITC Report, pp. 11-12. Exhibit US-1.

<sup>67</sup> ITC Report, p. 11. Exhibit US-1.

<sup>68</sup> ITC Report, p. 11. Exhibit US-1.

<sup>69</sup> ITC Report, p. 11 and 22. Exhibit US-1.

<sup>70</sup> ITC Report, p. 11 - 12 and 22. Exhibit US-1.

<sup>71</sup> ITC Report, p. 12 and 22. Exhibit US-1.

<sup>72</sup> ITC Report, p. 12. Exhibit US-1.

<sup>73</sup> ITC Report, p. 12 and 22. Exhibit US-1. Between 2004 and 2008, the subject imports increased their share of the U.S. market more than three-fold, growing from 4.7 percent in 2004 to 16.7 percent in 2008.

<sup>74</sup> ITC Report, p. 11. Exhibit US-1.

Whether viewed in absolute or relative terms, and whether viewed in terms of the increase from 2007 to 2008 alone or the increase in the last two full years (or even the last three years), the increases were large, rapid, and continuing at the end of the period – and from an increasingly large base.<sup>75</sup>

## **2. The Domestic Industry was Materially Injured**

34. The ITC next turned to the condition of the industry and found that the domestic industry was materially injured.<sup>76</sup> As the ITC noted, virtually of the industry’s indicators declined during the period of investigation.<sup>77</sup> The industry’s capacity, production, shipments, number of workers and hours worked, productivity, and financial performance fell to their lowest levels of the period of investigation in 2008.<sup>78</sup> The U.S. industry closed four plants during the period and announced plans to close three more plants in 2009.<sup>79</sup> Finally, the industry’s operating income levels fell to their lowest level of the period in 2008, the final year of the period.<sup>80</sup>

## **3. Chinese Imports were a Significant Cause of Material Injury**

35. The ITC next determined that the rapidly increasing imports of tires from China were a significant cause of material injury to the domestic tires industry.<sup>81</sup> The ITC found that, over the period of review, the subject imports from China had consistently and increasingly undersold U.S. tires.<sup>82</sup> Specifically, the Chinese tires undersold U.S. tires in 119 of 120 possible price comparisons at average margins of underselling of 18.9 percent.<sup>83</sup> The ITC found that this consistent underselling by rapidly growing subject imports caused the industry’s operating income margins to deteriorate during the period of investigation.<sup>84</sup>

36. Noting that the industry experienced a considerable increase in its costs of goods sold, the ITC found that “consistent underselling by the subject imports prevented domestic producers

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<sup>75</sup> ITC Report, p. 12. Exhibit US-1.

<sup>76</sup> ITC Report, pp. 15-18. Exhibit US-1.

<sup>77</sup> ITC Report, p. 18, pp. 15-18. Exhibit US-1.

<sup>78</sup> ITC Report, pp. 15 - 18. Exhibit US-1.

<sup>79</sup> ITC Report, p. 18 and 15. Exhibit US-1.

<sup>80</sup> ITC Report, p. 17. Exhibit US-1.

<sup>81</sup> ITC Report, pp. 18-29. Exhibit US-1.

<sup>82</sup> ITC Report, p. 23. Exhibit US-1. The average margin of underselling for Chinese tires increased by their greatest amount in 2007, the year in which the volume of rapidly increasing imports rose by their greatest amount. In 2008, the average margin of underselling for the six products remained at nearly the same level as in 2007 (23.6 percent in 2008 as compared to 25.4 percent in 2007) and was significantly above the average for the six products in each of the years 2004-2006. *Id.*

<sup>83</sup> ITC Report, p. 23. Exhibit US-1.

<sup>84</sup> ITC Report, pp. 23-24. Exhibit US-1.

from raising their prices sufficiently to offset [their] higher production costs,” which “thus suppressed prices” for the domestic producers.<sup>85</sup> In other words, as the ITC noted, “the sharp increase in [the] ratio [of the industry’s costs of good sold to net sales] in 2008, when the volume of subject imports was at its highest and the margin of underselling was nearly at its greatest, indicates that U.S. producers were experiencing a cost-price squeeze and unable to pass increasing raw materials costs on to their customers.”<sup>86</sup>

37. The ITC found that this consistent underselling by the rapidly increasing volumes of subject imports had also considerably eroded the domestic industry’s market share, leading to a sharp decline in virtually all of the domestic industry’s performance indicators.<sup>87</sup> There was a clear correlation between the subject imports growth in market share, which increased by 12.0 percentage points over the period, and the decline in the industry’s market share, which fell by 13.7 percentage points over the period.<sup>88</sup> Moreover, the ITC found, this erosion in the U.S. industry’s market share led to substantial declines in the industry’s capacity, production, shipments and employment levels during the period as well.<sup>89</sup> As the ITC pointed out, “all of these indicators were at their lowest levels of the period in 2008 when subject imports were at their highest, and the largest declines in these indicators have occurred since 2006 when subject imports exhibited the greatest and fastest increases.”<sup>90</sup>

38. The ITC found that this growth in subject imports forced U.S. producers to reduce their capacity levels so that they could “focus on the parts of their business in which they could expect to remain profitable despite the impact of subject imports from China.”<sup>91</sup> The ITC explained that the “substantial reduction in domestic capacity and the closures of U.S. plants during the period examined were largely in reaction to the significant and increasing volume of subject imports from China, and were not, as respondents argue, part of a strategy by domestic tire producers to voluntarily abandon the low-price, ‘value’ segment of the U.S. market.”<sup>92</sup> The ITC pointed out that the industry’s decision to shut down a number of its production facilities was directly correlated with a period of extraordinary growth in the size of the Chinese industry and its exports to the United States.<sup>93</sup> Furthermore, the ITC pointed out, three companies which shut down production reported that low-price import competition was an important factor in these

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<sup>85</sup> ITC Report, p. 24. Exhibit US-1.

<sup>86</sup> ITC Report, p. 24. Exhibit US-1.

<sup>87</sup> ITC report, p. 23. Exhibit US-1. In this regard, the ITC noted, the “close substitutability of the domestic product and the subject imports combined with pervasive underselling by significant and growing margins enhanced the ability of subject imports to displace domestically produced tires in the U.S. market.” *Id.*

<sup>88</sup> ITC Report, p. 24. Exhibit US-1.

<sup>89</sup> ITC Report, p. 24. Exhibit US-1.

<sup>90</sup> ITC Report, p. 24. Exhibit US-1.

<sup>91</sup> ITC Report, p. 24. Exhibit US-1.

<sup>92</sup> ITC Report, p. 25. Exhibit US-1.

<sup>93</sup> ITC Report, p. 25. Exhibit US-1.

decisions.”<sup>94</sup>

39. The ITC also specifically considered the argument that competition in the U.S. market was so attenuated that subject imports could not possibly be a significant cause of material injury to the domestic industry.<sup>95</sup> Certain parties claimed that the subject and U.S. tires were generally being sold in different “category” sectors of the market.<sup>96</sup> The ITC rejected this argument, noting that market participants did not agree on the exact contours or scope of these market sectors, and that there was significant competition between the subject imports and U.S. tires in the market sectors in which the subject imports were supposedly concentrated.<sup>97</sup> Accordingly, the ITC found that competition between subject and U.S. tires in the market place was not attenuated.

40. The ITC concluded that rapidly increasing imports of the subject tires from China were a significant cause of material injury to the domestic industry producing such tires.<sup>98</sup> The ITC stated that:

The significant increase in the volume of such imports coincided with significant underselling of the domestic products by the subject imports. It also coincided with the sharp decline in the domestic industry’s performance factors. The rising volume of subject imports from China has displaced domestic sales, and this displacement has led to declining domestic production, shipments, capacity utilization, employment, and profitability.<sup>99</sup>

Accordingly, the ITC made an affirmative finding of market disruption.

#### **D. The ITC’s Remedy Recommendation**

41. After voting on the issue of market disruption, the ITC then proceeded to the remedy phase of its investigation. For that portion of the investigation, the ITC permitted all parties to file final comments on the appropriate nature of the remedy by June 24, 2009.<sup>100</sup>

42. After considering those comments, the four ITC Commissioners who found market disruption proposed that the President impose additional duties on subject tires from China for a three-year period. Specifically, they proposed that the President impose an additional duties on the subject imports in the amount of 55 percent *ad valorem* in the first year of the remedy, 45

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<sup>94</sup> ITC Report, p. 24. Exhibit US-1.

<sup>95</sup> ITC Report, p. 26-27. Exhibit US-1.

<sup>96</sup> ITC Report, p. 25. Exhibit US-1.

<sup>97</sup> ITC Report, p. 25. Exhibit US-1.

<sup>98</sup> ITC Report, p. 29. Exhibit US-1.

<sup>99</sup> ITC Report, p. 29. Exhibit US-1.

<sup>100</sup> 74 Fed. Reg. 19593 (April 29, 2009), ITC Report, Appendix A. Exhibit US-1.

percent *ad valorem* in the second year, and 35 percent *ad valorem* in the third year.<sup>101</sup>

43. The ITC transmitted its report to the U.S. Trade Representative on July 9, 2009. The report included the determination and remedy proposal of the ITC, the views of the ITC, the views of the dissenting ITC Commissioners, and a summary of the information obtained in the investigation.<sup>102</sup> The ITC released a public version of its report shortly after transmitting the confidential version and posted it on its website.

44. We note that, throughout its submission China cites to the dissenting views. The view of the dissenting Commissioners are not the determination or recommendation of the U.S. competent authority. They simply reflect the dissent's interpretation of the evidence on the record. The only views pertinent to this dispute are those expressed in the ITC majority determination.

#### **E. The President's Remedy Determination**

45. After receiving the ITC report, the U.S. Trade Representative published notice in the *Federal Register* of the proposed measure and opportunity for public comment. The notice invited domestic producers, importers, exporters, and other interested parties to submit views and evidence by July 27, 2009, on the appropriateness of the proposed measure and whether they would be in the public interest. The notice also announced that the U.S. Trade Representative would hold a public hearing on August 7, 2009, if one was requested.<sup>103</sup> A hearing was requested and it was held on August 7, 2009. Representatives from the USW, Chinese industry, and importers of subject tires, among others, participated in the hearing.<sup>104</sup>

46. On September 11, 2009, the President announced his decision to impose additional duties on imports of the subject tires from China for a three-year period in the amount of 35 percent *ad valorem* in the first year, 30 percent *ad valorem* in the second year, and 25 percent *ad valorem* in the third year. His determination is embodied in Presidential Determination No. 2009-28<sup>105</sup> and Proclamation 8414.<sup>106</sup>

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<sup>101</sup> ITC Report, p. 1. Exhibit US-1.

<sup>102</sup> See generally ITC Report. Exhibit US-1.

<sup>103</sup> 74 Fed. Reg. 34387 (July 15, 2009). Exhibit US-4.

<sup>104</sup> Public materials submitted to the U.S. Trade Representative as part of the public hearing process are available through [www.regulations.gov](http://www.regulations.gov), docket number USTR-2009-0017. The docket includes all public submissions and the hearing transcript. The transcript contains a list of those participating in the hearing. Exhibit US-5.

<sup>105</sup> Presidential Determination No. 2009-28 of September 11, 2009 (74 Fed. Reg. 47433-47434, September 18, 2009). Exhibit US-6.

<sup>106</sup> Proclamation 8414 of September 11, 2009, To Address Market Disruption From Imports of Certain Passenger Vehicle and Light Truck Tires From the People's Republic of China (74 Fed. Reg. 47861, September 17, 2009). Exhibit US-7.



## **F. China’s Arguments Regarding the Political Nature of the Measure are Incorrect**

47. As is evident from the above factual background, under Section 421, no remedy decision goes before the President unless and until the ITC has determined that imports from China are a significant cause of market disruption. China’s attempt to cast doubt on the legitimacy of the measure challenged by characterizing it as politically influenced has no place in this proceeding.<sup>107</sup>

48. Section 421 contains two distinct phases for a domestic proceeding under the transitional mechanism. The first phase involves the determination of the existence, or not, of market disruption or threat thereof. The statute entrusts this task to the ITC, which is an independent agency of the U.S. government. The ITC is an independent, quasi-judicial federal agency. It was created by Congress and is headed by six Commissioners, normally appointed for 9-year terms. It has broad investigative responsibilities on matters of trade. The ITC serves as a Federal resource for collecting and analyzing trade data. This information and analysis are provided to the President, the Office of the U.S. Trade Representative, and Congress.

49. Section 421 requires that the ITC publish a notice in the Federal Register and hold public hearings at which it must provide interested parties the opportunity to be present, to present evidence, to respond to the presentations of other parties, and otherwise be heard.<sup>108</sup> China notes that five U.S. Senators and five U.S. Congressmen appeared before the ITC during the market disruption hearing.<sup>109</sup> As should be clear from the U.S. statute, any interested party may appear before the ITC, including U.S. Senators and Congressmen. In fact, any representative of the Chinese government would have been allowed to appear before the ITC, should they have wanted to do so. Given this, the fact that Senators and Congressmen appeared before the ITC does not establish, as China suggests, that the ITC’s proceeding was tainted by political influence. It is simply evidence that the ITC and the U.S. government have open, transparent, and robust procedures in these investigations.

50. Only if the ITC finds that there is market disruption (or threat thereof), does the investigation proceed to the next phase - the remedy phase.<sup>110</sup> Under the statute, the U.S. Trade Representative must solicit comments about the appropriate remedy and hold a public hearing, if

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<sup>107</sup> China First Submission, paras. 13-18, and 36.

<sup>108</sup> 19 U.S.C. § 2451(b)(5). Exhibit US-3.

<sup>109</sup> China First Submission, para. 36.

<sup>110</sup> As China is well aware, there have been seven Section 421 investigations, including *Tires*. On two occasions, the ITC found that there was no market disruption and the investigation therefore ended. In each of the other four investigations (aside from the *Tires* investigation), the President exercised his discretion not to impose a remedy.

one is requested.<sup>111</sup> The U.S. Trade Representative makes a recommendation on remedy to the President, who then decides what remedy is appropriate, if any.<sup>112</sup>

51. To support its theory that the decision in the *Tires* investigation was preordained, China points to a letter prepared by President Obama when he was a candidate for the Presidency. China’s reliance on this letter is misplaced. The letter notes only that, as President, he would decide Section 421 cases “on their merits.”<sup>113</sup> This statement is hardly remarkable. Moreover, it is precisely what the President (and the ITC) did in the *Tires* investigation. Given this, China’s attempt to rely on newspaper editorials proves nothing about the investigation other than the United States has a press that is free to say what it wants.

52. Furthermore, China asserts that the quote from the U.S. Trade Representative announcing the President’s decision is also proof of the “context within which the decision” was made.<sup>114</sup> In its entirety the relevant section of the USTR press release from which this is taken reads: “This Administration is doing what is necessary to enforce trade agreements on behalf of American workers and manufacturers. Enforcing trade laws is key to maintaining an open and free trading system.” Again, there is nothing remarkable about the U.S. Trade Representative making such a statement. WTO Members have negotiated the WTO Agreement – including its various safeguard mechanisms – as a means of making progress towards opening markets and improving the trading system. Each Member will want to ensure that it gets the benefits of what it bargained for, and thus enforcement is both a natural and crucial part of the trading system. That is the appropriate context for the statement by the U.S. Trade Representative.

53. The Panel should set aside China’s commentary on U.S. politics.

#### **IV. LEGAL ARGUMENTS**

##### **A. Analytical Framework**

##### **1. China Bears the Burden of Proof**

54. In WTO dispute settlement, it is the complaining party that bears the burden of proving that an obligation has not been satisfied. In *US – Corrosion-Resistant Steel CVD*, the Appellate Body explained that the complaining party bears the burden of proof with respect to an “as such” claim as well as an “as applied” claim:

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<sup>111</sup> 19 U.S.C. § 2451(h). Exhibit US-3.

<sup>112</sup> 19 U.S.C. § 2451(k). Exhibit US-3.

<sup>113</sup> See Exhibit CN-6.

<sup>114</sup> China First Submission, para. 18.

We note, first, that, in dispute settlement proceedings, Members may challenge the consistency with the covered agreements of another Member’s laws, as such, as distinguished from any specific application of those laws. In both cases, the complaining Member bears the burden of proving its claim. In this regard, we recall our observation in *US – Wool Shirts and Blouses* that:

... it is a generally-accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that *the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence.* (emphasis added)

Thus, a responding Member’s law will be treated as WTO-*consistent* until proven otherwise. The party asserting that another party’s municipal law, as such, is inconsistent with relevant treaty obligations bears the burden of introducing evidence as to the scope and meaning of such law to substantiate that assertion.<sup>115</sup>

55. Accordingly, the burden is on China to prove that the United States has acted inconsistently with its WTO obligations with respect to China’s as such and as applied challenges.

## 2. Standard of Review

56. Article 11 of the DSU defines generally a panel’s mandate in reviewing the consistency with the covered agreements of measures taken by a Member. Article 11 of the DSU instructs the Panel to “make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability and conformity with the relevant covered agreements. . . .”

57. The provisions of the Protocol of Accession, as part of the WTO Agreement, are provisions of a covered agreement.<sup>116</sup> Neither paragraph 16 of China’s Protocol of Accession, nor any other provision of the Protocol of Accession, contains a special standard of review for

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<sup>115</sup> *US – Corrosion-Resistant Steel Sunset Review (AB)*, paras. 156-157 (emphasis in original) (footnote omitted).

<sup>116</sup> Paragraph 1.2 of China’s Protocol of Accession states that the Protocol “shall be an integral part of the WTO Agreement.” This has been recognized by prior panels and the Appellate Body. See, *China – Auto Parts (Panel)* para. 7.740; *China – Auto Parts (AB)*, para. 213; and *China – Publications and Audiovisual Products (Panel)*, para. 7.555. There does not appear to be any disagreement on this point. See China First Submission, para. 46.

dispute settlement purposes. Therefore, as with any other covered agreement (except the *Antidumping Agreement*),<sup>117</sup> Article 11 of the DSU is the applicable standard.

58. In declining to import a different standard of review where an agreement does not so provide, the Appellate Body has explained with regard to the SPS Agreement that “[t]o adopt a standard of review not clearly rooted in the text of the of the *SPS Agreement* itself, may well amount to changing that finely drawn balance; and neither a panel nor the Appellate Body is authorized to do that.”<sup>118</sup>

59. The Appellate Body has stated on various occasions that Article 11 is the applicable standard of review panels must use in their review of factual determinations by an investigating authority.<sup>119</sup> In particular, the Appellate Body has confirmed that a panel must neither conduct a *de novo* review nor simply defer to the conclusions of the investigating authority.<sup>120</sup> A Panel must examine whether, in the light of the evidence on the record, the conclusions reached by the investigating authority are reasoned and adequate.<sup>121</sup> Significantly, the Appellate Body has noted that while the standard of review articulated by the Appellate Body in the context of agency determinations under a particular agreement may be instructive for cases under another agreement that also involves agency determinations, “an ‘objective assessment’ under Article 11 of the DSU must be understood in the light of the obligations of the particular covered agreement at issue in order to derive the more specific contours of the appropriate standard of review.”<sup>122</sup>

60. China asserts that “[t]he Panel should apply the same standard developed in the context of global safeguards . . . to a dispute arising out of Article 16 of the Protocol.”<sup>123</sup> As we have explained, this notion runs contrary to the Appellate Body’s instruction that an objective assessment “must be understood in the light of the obligations of the particular covered agreement at issue.” However, throughout its submission, China argues goes further, arguing

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<sup>117</sup> The *Antidumping Agreement* is the only covered agreement that provides a special standard of review (Article 17.6).

<sup>118</sup> *EC – Hormones (AB)*, para. 113 - 115. In *EC – Hormones*, the Appellate Body rejected the EC’s argument that a standard similar to that found in Article 17.6(i) of the *Antidumping Agreement* should be used in a dispute under the SPS Agreement because it should be “applicable in ‘all highly complex factual situations’”. The Appellate Body explained that Article 11 provides the correct standard of review.

<sup>119</sup> *US – Softwood Lumber ITC Investigation (Article 21.5)(AB)*, para. 93 and footnote 134 (citing to *Argentina – Footwear (AB)*, paras. 119-121; *US – Cotton Yarn (AB)*, paras. 74-78; *US – DRAMS CVD (AB)*, paras. 183, 186-188; *US – Hot-Rolled Steel (AB)*, para. 55; *US – Lamb Meat (AB)*, paras. 101, 105-108; *US – Steel Safeguards (AB)*, para. 299; and *US – Wheat Gluten (AB)*, paras. 160-161.

<sup>120</sup> *US – Softwood Lumber ITC Investigation (Article 21.5)(AB)*, para. 93; *US – DRAMS CVD (AB)*, para. 183.

<sup>121</sup> *US – Softwood Lumber ITC Investigation (Article 21.5)(AB)*, para. 93.

<sup>122</sup> *US – DRAMS CVD (AB)*, para. 184. See also, *US – Softwood Lumber ITC Investigation (Article 21.5)(AB)*, para. 95.

<sup>123</sup> China First Submission, para. 57.

that the obligations in paragraph 16 of the Protocol are stricter than the obligations in the Safeguards Agreement, and, therefore, subject to a higher level of scrutiny.

61. Paragraph 16 of the Protocol and the Safeguards Agreement lay out different criteria for relief from increasing imports. Because the obligations contained in the Protocol and the Safeguards Agreement are different, the Panel’s “objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements” under Article 11 of the DSU cannot simply follow the standard applicable to the Safeguards Agreement. Labeling paragraph 16 of the Protocol as “stricter” than the Safeguards Agreement is neither accurate nor helpful to this task. It is not accurate because, as the United States discusses below, paragraph 16 is on the whole less prescriptive than the Safeguards Agreement and, accordingly, leaves a Member more latitude to take a safeguard measure. It is not helpful because labeling paragraph 16 “stricter” indicates nothing about the meaning of individual obligations or terms within those obligations. In fact, under the guise of giving paragraph 16 of the Protocol a “stricter” interpretation, China attempts to import substantive obligations from the Safeguards Agreement that are simply not found in paragraph 16.

62. In this regard, we note that China asserts that “[u]nder this standard, there is a formal and substantive aspect of the review. The panel must analyze whether the investigating authority has evaluated all relevant factors, and whether it provided a reasoned and adequate explanation for its decision.”<sup>124</sup> Although China does not provide a citation, it appears to be paraphrasing the following passage from Appellate Body report in *US – Lamb Meat*:

Thus, an ‘objective assessment’ of a claim under Article 4.2(a) of the *Agreement on Safeguards* has, in principle, two elements . . . a *formal* aspect and a *substantive* aspect. . . The formal aspect is whether the competent authorities have evaluated ‘all relevant factors’. The substantive aspect is whether the competent authorities have given a reasoned and adequate explanation for their determination. . . . This dual character . . . is mandated by the nature of the specific obligations that Article 4.2 of the *Agreement on Safeguards* imposes on competent authorities.<sup>125</sup>

It is clear that this passage reflects the application of the general standard of review under Article 11 to the specific obligations of Article 4.2 of the Safeguards Agreement. Those specific obligations are simply not found in paragraph 16 of the Protocol.

### **3. No Special Interpretive Approach is Required by the Protocol**

63. As an integral part of the WTO Agreement, China’s Protocol of Accession, including the transitional mechanism, must be interpreted in accordance with the customary rules of

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<sup>124</sup> China First Submission, para. 57.

<sup>125</sup> *US – Lamb Meat (AB)*, paras. 103 - 104.

interpretation reflected in Articles 31 and 32 of the Vienna Convention.<sup>126</sup> Therefore, the Panel’s task must be “guided by Article 31(1) of the Vienna Convention, which codifies the fundamental rule of treaty interpretation, and which provides that a treaty shall be interpreted in good faith in accordance with the ordinary meaning of its terms, in their context and in the light of the object and purpose of the treaty.”<sup>127</sup>

64. Nothing in the Vienna Convention supports the proposition that certain agreements, or provisions within agreements, should be interpreted more strictly than others. As explained above, the Vienna Convention requires that treaties be interpreted in “good faith.” Anything other than a good faith interpretation amounts to an attempt to prejudge the interpretive exercise.

65. China argues that the “object and purpose” of the Protocol is to “permit China to enjoy the rights of WTO membership in return for the obligation it assumes,”<sup>128</sup> which necessarily make the terms of the transitional mechanism stricter than those of the Safeguards Agreement.<sup>129</sup> As the United States has already noted, characterizing an agreement as “strict” is not useful in deriving the meaning of its individual terms. In any event, China provides no citations for its elaboration of the “object and purpose” of the Protocol.

66. In addition, the Protocol is an integral part of the WTO Agreement, as such, it does not have its own “object and purpose”, in the sense of Article 31(1) of the Vienna Convention, which refers to the treaty’s object and purpose. Of course, it is correct that individual treaty provisions have individual “purposes” or functions, for example, GATT 1994 Article I sets out the MFN obligation. But the “purpose” of any provision (in this case the transitional mechanism) can be determined only by ascertaining what the provision means. Ascertaining the meaning of a provision requires interpreting that provision, and under customary international law (and DSU Article 3.2) that process of interpretation proceeds in accordance with the rules of interpretation reflected in Articles 31 and 32 of the Vienna Convention. Any attempt to identify *a priori* some supposed “purpose” and then interpret the text on the basis of that “purpose” is simply to put the cart before the horse. It is also in invitation to import into the agreement, obligations not found there.

67. To push its preferred interpretive outcome, China also mentions the “WTO’s overarching objective of reducing barriers to trade and promoting trade expansion.”<sup>130</sup> However, the Marrakesh Agreement is more precise, recognizing the Members’ desire of:

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<sup>126</sup> The Appellate Body so recognized in *China – Auto Parts*, para. 214.

<sup>127</sup> *US – Line Pipe (AB)*, para. 244.

<sup>128</sup> China First Submission, para. 105.

<sup>129</sup> Although China’s arguments on this point permeate the submission, their main expositions of this can be found at paragraphs 104 to 109, 191 to 193, and 375 to 378. See also, paras. 48 and 49.

<sup>130</sup> China First Submission, para. 106.

entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations.<sup>131</sup>

China's Protocol of Accession is an integral part of the WTO Agreement, and therefore, by its own terms it is an expression of the "reciprocal and mutually advantageous" arrangement that the Members entered into when they agreed to China's accession.

68. In addition, if there is any purpose to the Protocol it is that expressed in the Protocol's preamble: to set out "the results of the negotiations directed toward the establishment of the terms of accession" of China to the WTO and to reflect the "terms and conditions" on which such accession was agreed by the Ministerial Conference.<sup>132</sup> Thus, the focus is on the terms and conditions set out in the document itself, which include the transitional mechanism, contained in paragraph 16. The language in the preamble to the Protocol echoes the language in the Marrakesh Agreement, Article XII:1 on accessions, which states that States or separate customs territories may acceded to the WTO Agreement "on terms to be agreed between it and the WTO."

69. Each WTO accession involves negotiating rights and obligations between the acceding Member and existing Members. For example, an acceding Member may gain transition periods in which to bring WTO-inconsistent domestic measures into compliance with its new obligations. China itself benefits from several of these.<sup>133</sup> WTO Members, concerned about the potential for import surges from China, insisted that one of the "terms and conditions" for China's accession was the negotiation of a transitional mechanism.<sup>134</sup> The result of those negotiations and that particular balancing of interests is reflected in nine provisions comprising

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<sup>131</sup> Preamble to the Marrakesh Agreement Establishing the World Trade Organization.

<sup>132</sup> Preamble to China's Protocol of Accession.

<sup>133</sup> For example, China benefitted from the following transition periods, among others: transition periods: three-years for non-tariff measures, including import quotas, import licenses and/or tendering requirements on 377 products (Protocol para. 7.1, Annex 3); three-years with respect to trading rights (Protocol, para. 5.1 and Working Party Report, paras. 83-84); one-year grace period before being obligated to provide national treatment under GATT Article III with respect to pharmaceutical products, spirits, and chemicals (Working Party Report, para. 23); two-year grace period before being required to comply with certain valuation obligations (Working Party Report, para. 143); phase-in of tariff commitments for many products, ranging from five years to longer (China Goods Schedule); phase-in of GATS commitments in numerous services sectors over time (China's GATS Schedule); allowance of up to three years or more with respect to China's commitment to repeal inconsistent laws and regulations to bring them into conformity with various agreements, e.g. with respect to TRIPS (Working Party Report, paras. 259, 263, 265, 275, 284, 288, 292, and 296).

<sup>134</sup> In negotiating the appropriate balance of rights and obligations in the context of China's accession, WTO Members recognized that because of the "significant size, rapid growth and transitional nature of the Chinese economy, a pragmatic approach" had to be taken. Report of the Working Party on the Accession of China ("Working Party Report"), WT/ACC/CHN/49 (1 October 2001), para. 9.

paragraph 16 of the Protocol. China’s arguments on “object and purpose” cannot add to those provisions.<sup>135</sup>

70. Thus, the country-specific provisions of China’s Protocol do not, as China argues, by reason of their “exceptional” nature as against the “core most-favored-nation obligation”<sup>136</sup> justify a heightened standard of scrutiny. Those country-specific provisions are the outcome that China and the WTO Members at the time negotiated as a means to make it possible for China to acceded to the benefits (and obligations) of WTO Membership, while at the same time making it possible for existing WTO Members to accept the entry of this particular new Member into the WTO system. In fact, the WTO Agreement at its inception recognized that country-specific safeguards were appropriate in some contexts by including the country-specific transitional safeguard in the *Agreement on Textiles and Clothing*.<sup>137</sup> In disputes related to that transitional safeguard no special interpretive approach was used.<sup>138</sup>

71. China also attempts to justify a higher level of scrutiny with respect to paragraph 16 of the Protocol by arguing that it should be viewed as a temporary “escape valve” very much in line with the object and purpose of “GATT Article XIX of the GATT 1994 and the *Agreement on Safeguards*.”<sup>139</sup> There is nothing to support this argument. In confirming the “extraordinary nature of [global] safeguard measures”, the Appellate Body explained:

As part of the context of paragraph 1(a) of Article XIX, we note that the title of Article XIX is: “*Emergency Action on Imports of Particular Products*”. The words “emergency action” also appear in Article 11.1(a) of the *Agreement on Safeguards*. We note once again, that Article XIX:1(a) requires that a product be imported “*in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers*”. . . . In our view, the text of Article XIX:1(a) of the GATT 1994, read in its ordinary meaning and in its context, demonstrates that safeguard measures were intended by the drafters of the GATT to be matters out of the ordinary, to be matters of urgency, to be, in short, “emergency actions.” And, such “emergency actions” are to be invoked only in situations when, as a result of obligations incurred under the GATT 1994, a Member finds itself confronted with developments it had not “foreseen” or “expected” when it incurred that obligation.”<sup>140</sup>

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<sup>135</sup> See *US – Line Pipe (AB)*, paras. 82-83.

<sup>136</sup> China First Submission, para. 108.

<sup>137</sup> Article 6 of the *Agreement on Textiles and Clothing*.

<sup>138</sup> See *US- Cotton Yarn (Panel)*, paras. 7.16-7.35.

<sup>139</sup> China First Submission, paras. 106 - 107.

<sup>140</sup> *US – Line Pipe (AB)*, para. 81. See also, *US - Steel Safeguards (AB)*, para. 350 (emphasizing the need for increased imports to be as a result of an event that was “unforeseen” or “unexpected”).



72. It is clear from the above passage, that the extraordinary nature of global safeguards is squarely rooted in the texts and immediate contexts of Article XIX of the GATT 1994 and the text of the Safeguards Agreement. The extraordinary nature of global safeguards is squarely rooted on the explicit references in the Safeguards Agreement to “emergency action,” “unforeseen and unexpected” developments, the “serious injury” standard, and to products being “imported in such increased quantities and under such conditions”. (Emphasis added). As the United States will demonstrate below, these elements are simply missing from the text of paragraph 16 of the Protocol of Accession.

#### **4. Paragraph 16 of the Protocol Does not Incorporate GATT 1994 Article XIX or the Safeguards Agreement**

73. China asserts that the transitional mechanism contains stricter standards than the Safeguards Agreement. China’s assertion that the “already strict standards” of GATT 1994 Article XIX and of the Safeguards Agreement have been incorporated and enhanced in the Protocol is not supported by the plain text of paragraph 16 in its proper context.<sup>141</sup> As the Appellate Body has said: “words must not be read into the Agreement that are not there.”<sup>142</sup>

74. It is evident from the text of paragraph 16, in light of the context provided by the Working Party Report, that the Protocol does not incorporate the disciplines of Article XIX of the GATT 1994 or the disciplines of the Safeguards Agreement. First, there is no cross-reference in paragraph 16 to Article XIX or to specific provisions of the Safeguards Agreement. The only reference to the Safeguards Agreement is found in Paragraph 16.1. That paragraph simply states that “whether the affected Member should pursue application of a [global safeguard]” is one of the options that may be discussed in negotiations over seeking a mutually agreed solution. This reference can in no way be interpreted to incorporate the disciplines of the Safeguards Agreement, explicitly or implicitly.<sup>143</sup> On the contrary, this indicates that the transitional mechanism exists outside and apart from the global safeguard disciplines embodied in GATT Article XIX and the Safeguards Agreement.

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<sup>141</sup> Paragraphs 245 and 246 of the Working Party Report provide context for the obligations undertaken by the WTO Members in paragraph 16 of the Protocol. Paragraph 246 of the Working Party Report states:

“Members of the Working Party noted that the Draft Protocol included specific requirements that WTO Members needed to follow in connection with an action under that Section. Members of the Working Party confirmed that in implementing the provisions on market disruption, WTO Members would comply with those provisions and the following . . .”.

<sup>142</sup> *US - Line Pipe (AB)*, para. 250. See also, footnote 250.

<sup>143</sup> Likewise, the references to the notifications to be made to the Committee on Safeguards cannot possibly mean that the obligations of the Safeguards Agreement have been incorporated into Paragraph 16.

75. Textual differences between the Protocol and the Safeguards Agreement also indicate that the Protocol does not incorporate the standards and obligations of Safeguards Agreement or GATT Article XIX. The injury standards are the most significant of these textual differences. The Safeguards Agreement provides for a “serious injury” standard, while paragraph 16.4 states that the injury at issue in a paragraph 16 market disruption determination is “material injury.” Paragraph 16 and the Working Party Report do not further define “material injury,” However, “material injury” is the standard provided for in Article VI of the GATT 1994, Articles 5 (footnote 11) and 15 (footnote 45) of the *Agreement on Subsidies and Countervailing Measures* (“SCM Agreement”), and Article 3 (footnote 9) of the *Anti-Dumping Agreement*.<sup>144</sup> And, in *US – Lamb Meat*, the Appellate Body explained that “the word ‘serious’ connotes a much higher standard of injury than the word ‘material’.”<sup>145</sup> This distinction serves to demonstrate that the negotiators of the Protocol did not intend to incorporate the Safeguards Agreement or Article XIX of the GATT, either directly or by implication.

76. Finally, the Safeguards Agreement itself demonstrates the error in China’s argument. That Agreement contains several explicit references to Article XIX of the GATT 1994.<sup>146</sup> If the negotiators of the Protocol had sought to make portions of Article XIX, or of the Safeguards Agreement, applicable to the transitional mechanism, they would have done so explicitly. The Protocol’s silence indicates that the obligations under the Safeguards Agreement and Article XIX of the GATT 1994 are not incorporated.

77. In sum, the Panel should perform its examination of the requirements of the transitional mechanism by looking at the text of paragraph 16, read in context with paragraph 246 of the Working Party Report. It should be clear from the text of the Protocol, that the standards of the Safeguards Agreement have not been incorporated, either explicitly or implicitly, into the transitional mechanism and that China has no basis for claiming that the Panel must apply a higher or stricter standard of review in this proceeding. The United States will address other elements of this issue in its discussion of China’s arguments regarding “rapidly increasing” and “significant cause.”

**B. The ITC Reasonably Concluded That The Subject Imports from China Were “Increasing Rapidly” Under Paragraph 16 of the Protocol**

78. The ITC’s finding that the subject imports of passenger vehicle and light truck tires from China were “increasing rapidly,” both absolutely and relatively, so as to be a significant cause of material injury to the U.S. tires industry, was fully in accordance with the requirements of paragraphs 16.1 and 16.4 of the Protocol of Accession. As the ITC found, the record showed that imports from China increased rapidly on an absolute and relative level, with the absolute quantity

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<sup>144</sup> See *US – Lamb Meat (AB)*, para. 124 and footnote 76.

<sup>145</sup> *US – Lamb Meat (AB)*, para. 124 (footnote omitted).

<sup>146</sup> Safeguards Agreement, Preamble, Article 1, Article 10, and Article 11.

of subject imports increasing by 215 percent and the market share of the subject imports more than tripling during the period of investigation.<sup>147</sup> Moreover, the ITC provided a reasoned analysis of why these increases were rapid and were in such quantities as to cause material injury to the industry.<sup>148</sup> In sum, the ITC complied fully with U.S. obligations under the Protocol.

79. China’s challenges to the ITC’s finding have no merit. First, China mistakenly argues that paragraphs 16.1 and 16.4 of the Protocol impose a higher standard for assessing whether imports have increased rapidly than the Safeguards Agreement. China asserts that the ITC failed to apply the Protocol’s standard correctly.<sup>149</sup> China fails to realize that the “rapidly increasing” imports standard of the Protocol is both different and less demanding than the “increased imports” standard of the Safeguards Agreement. The ITC’s analysis was fully in accordance with the standard set forth in the Protocol.

80. Second, China also mistakenly argues that the ITC failed to examine the most recent data when assessing whether imports from China were increasing rapidly. In fact, the ITC addressed and relied on the most recent years of the period in finding that the subject imports were increasing rapidly. Finally, China tries to downplay the significance of the increase in imports by arguing that imports from China were growing only at a moderate and stable level. As the ITC found, the record actually showed that the increases in the subject imports were “large, rapid and continuing” at the end of the period.

81. As we discuss below, each of China’s arguments is unfounded and should be rejected by the Panel.

**1. The Protocol Does Not Impose a More Demanding Standard For Rapidly Increasing Imports than the Safeguards Agreement**

**a. The Standards of the Protocol and the U.S. Statute**

82. As China correctly states in its submission, paragraph 16 of the Protocol requires a competent authority to establish that imports of a product from China were “increasing rapidly,

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<sup>147</sup> ITC Report, p. 1-12 and 22. Exhibit US-1

<sup>148</sup> ITC Report at 11-12 and 22-29. Exhibit US-1

<sup>149</sup> China First Submission, para. 67.

either absolutely or relatively,” before it may find that “market disruption” exists.<sup>150</sup> Paragraph 16.1 of the Protocol first provides that:

In cases where products of Chinese origin are being imported into the territory of any WTO Member in such increased quantities or under such conditions as to cause or threaten to cause market disruption to the domestic producers of like or directly competitive products, . . . the WTO Member so affected may request consultations.<sup>151</sup>

83. Paragraph 16.4 of the Protocol provides further detail on the type of increase contemplated under the Protocol. Specifically, paragraph 16.4 provides that:

Market disruption shall exist whenever imports of an article, like or directly competitive with an article produced by the domestic industry, are increasing rapidly, either absolutely or relatively, so as to be a significant cause of material injury, or threat of material injury to the domestic industry.<sup>152</sup>

Thus, paragraph 16.4 makes clear that there should be a “rapid” increase, either on an absolute or relative level, in the imports of the article under investigation, and that the level of increase must be such “as to be a significant cause of material injury or threat of material injury” to the industry.

84. The U.S. statute directly tracks the language of the Protocol with respect to the ITC’s “increased imports” finding.<sup>153</sup> Under 19 U.S.C. §2451(b), the ITC is directed to investigate whether imports of a product from China “are being imported into the United States in such quantities or under such conditions as to cause or threaten to cause market disruption to the domestic producers of like or directly competitive products.”<sup>154</sup> Similarly, section 2451(c) of the statute directs the ITC to assess, in its market disruption analysis, whether imports from China “are increasing rapidly, either absolutely or relatively, so as to be a significant cause of material injury, or threat of material injury, to the domestic industry.”<sup>155</sup>

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<sup>150</sup> Protocol of Accession, para. 16.1 and 16.4. We would note that the text of the Protocol suggests, however, that a finding of “rapidly increasing” imports is not necessarily a pre-requisite to a finding of market disruption under the Protocol. Article 16.1 provides that market disruption may be found to exist when “products of Chinese origin are being imported in such increased quantities or under such conditions as to cause or threaten to cause market disruption.” This language suggests that it may be possible to meet the market disruption standard, in the absence of an increase, if the imports from China are being imported “under such conditions” as to cause or threaten market disruption. Protocol of Accession, para. 16.1.

<sup>151</sup> Protocol of Accession, para. 16.1. (Emphasis added).

<sup>152</sup> Protocol of Accession, para. 16.4. (Emphasis added).

<sup>153</sup> 19 U.S.C. §§2451(b) and (c)(1). Exhibit US-3.

<sup>154</sup> 19 U.S.C. §2451(b). Exhibit US-3.

<sup>155</sup> 19 U.S.C. §2451(c)(1). Exhibit US-3.

85. The ITC has explained that, under the statute, “the rapid increase should be recent or continuing, as opposed to in the distant past.”<sup>156</sup> Accordingly, the ITC “focus[es] on recent increases in subject imports” when analyzing whether there has been a rapid increase in imports.<sup>157</sup> Moreover, when performing that analysis, the ITC “look[s] to the increase and rate of increase in subject imports” as a means of assessing whether such an increase has occurred.<sup>158</sup>

86. It is important to make several points about the “increasing rapidly” standard of the Protocol. First, aside from the language cited in the two preceding paragraphs, paragraph 16 of the Protocol does not otherwise define the nature of the rapid increase that is sufficient to meet the requirements of paragraph 16. Accordingly, when assessing whether the ITC properly found that the subject imports were “increasing rapidly” during the period, the Panel will need to assess what the term “increasing rapidly” means by examining the ordinary meaning of that term as it is used in the specific context of the Protocol.<sup>159</sup>

87. The New Shorter Oxford English Dictionary specifies that “rapid” means “progressing quickly; developed or completed within a short time.” Accordingly, the phrase “increasing rapidly” would mean that any increase in the subject imports should be one that “progresses quickly” over time or is “developed or completed within a short time.”<sup>160</sup> Given this, when examining the ITC’s analysis, the Panel should assess whether the ITC reasonably concluded that the growth in Chinese imports had “progressed quickly” over the period of investigation or had been “developed or completed within a short period of time.” As we discuss below, the ITC’s finding was fully consistent with this standard.

88. When considering the meaning and scope of this term, the Panel must also take into account the “context” in which that term is used.<sup>161</sup> In this regard, the Protocol makes clear that the increase in imports must be rapid enough “to be a significant cause of material injury, or threat of material injury” to the industry.<sup>162</sup> Since the Appellate Body has made clear in other contexts that the “standard of ‘serious injury’ set forth in Article 4.1(a) [of the Safeguards Agreement] is, on its face, very high,” and that “the word ‘serious’ connotes a much higher standard of injury than the word ‘material,’”<sup>163</sup> the Protocol’s language linking “rapid increases” of imports to material injury or threat of material injury establishes that the import increases required by the Protocol are less significant than those required in the context of the Safeguards Agreement.

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<sup>156</sup> ITC Report, p. 10. Exhibit US-1.

<sup>157</sup> ITC Report, p. 11. Exhibit US-1.

<sup>158</sup> ITC Report, p. 11. Exhibit US-1.

<sup>159</sup> Articles 31 and 32 of the Vienna Convention; see *US – Line Pipe (AB)*, para. 244.

<sup>160</sup> *New Shorter Oxford English Dictionary* (2007) at 2463.

<sup>161</sup> Articles 31 and 32 of the Vienna Convention; see *US – Line Pipe (AB)*, para. 244.

<sup>162</sup> Protocol of Accession para. 16.4.

<sup>163</sup> *US–Lamb Meat (AB)*, para. 124.

89. Second, the language of the Protocol does suggest that a competent authority should examine whether the rapid increases have continued in the recent past, rather than at some distant point during the period of investigation. Because this language is tracked in the U.S. statute, the ITC has consistently explained that it must “focus on recent increases in imports” when analyzing whether there has been a rapid increase in imports.<sup>164</sup> It is also for this reason that the ITC has stated that a “rapid increase should be recent or continuing, as opposed to in the distant past.”<sup>165</sup> In other words, the ITC’s analytical approach under the statute is fully consistent with the standard of the Protocol.

90. Third, the Protocol does not, require a competent authority to obtain data concerning the increase in imports for any particular period of time.<sup>166</sup> More specifically, the Protocol does not contain language that indicates that a competent authority must obtain and analyze import data for the quarter most recently ended before the initiation of a competent authority’s investigation,<sup>167</sup> as China contends. Thus, as long as “the period selected by the ITC allows it to focus on the recent imports” and as long as the period is “sufficiently long to allow conclusions to be drawn regarding the existence of increased imports,” the Protocol allows the ITC flexibility as to the starting and ending points of its investigatory period.<sup>168</sup>

91. Finally, the Protocol does not specify how rapid an increase must be to meet the “increasing rapidly” standard of the Protocol, nor does it suggest that imports must be growing at their most rapid pace at the end of the period examined by a competent authority. Accordingly, the Protocol does not preclude a competent authority from finding imports to be “increasing rapidly” over the period examined simply because the rate of increase of the imports lessens somewhat at the end of the period.<sup>169</sup> Instead, the Protocol only requires that the competent authority find that there was a “rapid increase” in imports, on an absolute or relative basis, during the period, and that these imports were a significant cause of material injury or threat of material injury to the industry.<sup>170</sup> Indeed, as China itself concedes, there are any number

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<sup>164</sup> ITC Report, p. 11. Exhibit US-1. See also *Certain Ductile Iron Waterworks Fittings from China*, Inv. No. TA-421-4, USITC Pub. 3657 at p. 11 (Dec. 2003), Exhibit US-16; *Pedestal Actuators from China*, Inv. No. TA-421-1, USITC Pub. 3557 at p. 12 (Nov. 2002). Exhibit US-15.

<sup>165</sup> ITC Report, p. 10. Exhibit US-1

<sup>166</sup> See generally Protocol of Accession, paras. 16.1 and 16.4.

<sup>167</sup> See generally Protocol of Accession, paras. 16.1 and 16.4.

<sup>168</sup> See *US - Line Pipe (Panel)*, para. 7.201. In this regard, we note that the Appellate Body has stated in the context of the Antidumping Agreement that an investigating authority “is free to choose the methodology it will use in examining the ‘causal relationship’ between [unfair] imports and injury” as long as the methodology is a reasonable one under the circumstances. See, e.g., *EC - Pipe Fittings (AB)*, para. 189.

<sup>169</sup> China First Submission, paras. 111-135.

<sup>170</sup> Protocol of Accession, para. 16.4

of possible scenarios concerning import volume trends that would satisfy the “increasing imports” standard of the Protocol.<sup>171</sup>

**b. China’s Interpretation of the “Increasing Rapidly” Standard of the Protocol is Flawed**

**i. China’s Claim that the Protocol Contains a Stricter Standard than the Safeguards Agreement Has No Merit**

92. In its submission, China expends a great deal of effort establishing several propositions about the meaning of the “increasing imports” standard of the Protocol that are not particularly controversial.<sup>172</sup> For example, China notes that, under this standard, “the amount of imports must be becoming greater or enlarging” and that “not just any increase will be sufficient.”<sup>173</sup> It further observes that a competent authority must establish that imports are increasing “rapidly,” which means that they should be increasing “quickly” over the period of investigation.<sup>174</sup> Finally, China asserts that the Protocol contemplates that a competent authority should assess whether these increases have occurred in the recent past, rather than at some distant point in the past.<sup>175</sup>

93. These basic propositions are, for the most part, not in dispute. As we have pointed out, the United States agrees that not just any increase will satisfy the “rapidly increasing” standard of the Protocol, and that the increase should not have occurred in the distant past. As its determination demonstrates, the ITC made clear that it was not merely looking for any increase in imports over the period of investigation.<sup>176</sup> Instead, the ITC examined whether the subject imports were “increasing rapidly” in absolute or relative terms over the period, and concluded that they were, in fact, increasing in such a fashion.<sup>177</sup> In other words, the ITC was not, as China implies, simply looking to find a minor or small increase in imports over the period.

94. Similarly, as the ITC explicitly stated, it was not looking for a rapid increase in imports that occurred in the distant past. Instead, as we have pointed out above, the ITC followed its consistent view that, under the statute, “the rapid increase should be recent or continuing, as opposed to in the distant past,”<sup>178</sup> and noted its analysis should “focus on recent increases in

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<sup>171</sup> China First Submission, para. 81.

<sup>172</sup> China First Submission, paras. 66 - 85.

<sup>173</sup> China First Submission, paras. 68 and 71.

<sup>174</sup> China First Submission, para. 79.

<sup>175</sup> China First Submission, para. 74.

<sup>176</sup> ITC Report, pp. 10-11. Exhibit US-1.

<sup>177</sup> ITC Report, pp. 10-11. Exhibit US-1

<sup>178</sup> ITC Report, p. 10. Exhibit US-1.

imports.”<sup>179</sup> Furthermore, as we discuss in more detail below, the ITC did in fact focus on the last two years of the period, 2007 and 2008, in its analysis.<sup>180</sup> Given these facts, China’s suggestion that the ITC was looking for any increase, or one that occurred at any point in the past, is clearly mistaken.

95. Although much of what China says about the requirements of the Protocol is non-controversial, it is not satisfied with simply describing the basic standards of the Protocol. Instead, China goes beyond these principles and asks the Panel to apply a more rigorous “increasing imports” standard than the text warrants. For example, China does not accept that it is enough under the Protocol to find that imports are “increasing rapidly” over a recent period. Instead, China insists that the increase must be one that is so “steep” that it constitutes a “surge” of imports into the market.<sup>181</sup> Contrary to China’s view, the term used in the Protocol, “rapidly,” does not itself indicate that the increase must be “steep,” or that the increase must be so “rapid” as to be a “surge” into the market. Instead, the Protocol only requires that the increase be “rapid,” which means “quick.” And in this case, it was.

96. China further overreaches by asserting that the “increasing rapidly” requirement of the Protocol “articulates an even higher standard than the stringent standard set out in the Agreement on Safeguards.”<sup>182</sup> China grounds this assertion on the fact that the Protocol specifically requires that the subject imports be “increasing rapidly,” while the Safeguards Agreement requires “increased quantities” of imports. Similarly, citing other differences in wording between the two agreements, China alleges that “[i]ncreases for purposes of the Protocol must be even more recent than for global safeguards.”<sup>183</sup>

97. China’s arguments have no merit. First of all, as we previously noted, the “increasing rapidly” standard of the Protocol can only be understood in the light of the fact that the Protocol links an analysis of rapid increases to the existence of “material injury or threat of material injury.” The Appellate Body performed a similar analysis of the “in such increased quantities” requirement in the Safeguards Agreement, stating that:

We [have] underlined the importance of reading the requirement of “such increased quantities” in the context in which it appears in both Article XIX:1(a) of the GATT 1994 and Article 2.1 of the *Agreement on Safeguards*. That context includes the words “to cause or threaten to cause serious injury”. Read in context,

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<sup>179</sup> ITC Report, p. 11. Exhibit US-1. See also *Certain Ductile Iron Waterworks Fittings from China*, Inv. No. TA-421-4, USITC Pub. 3657 at p. 11 (Dec. 2003), Exhibit US-16; *Pedestal Actuators from China*, Inv. No. TA-421-1, USITC Pub. 3557 at p. 12 (Nov. 2002). Exhibit US-15.

<sup>180</sup> ITC Report, p. 11-12. Exhibit US-1

<sup>181</sup> China’s First Submission, para. 79 and 85.

<sup>182</sup> China First Submission, para. 103.

<sup>183</sup> China First Submission, para. 101.



it is apparent that “there must be ‘such increased quantities’ as to cause or threaten to cause serious injury to the domestic industry in order to fulfill this requirement for applying a safeguard measure.” Indeed, in our view, the term “such”, which appears in the phrase “such increased quantities” in Articles XIX:1(a) and 2.1, clearly links the relevant increased imports to their ability to cause serious injury or the threat thereof.<sup>184</sup>

98. The use of a similar structure in the Protocol “clearly links” the relevant increases in imports to their ability to cause material injury or threat of material injury.<sup>185</sup> Therefore, the Appellate Body’s reasoning in *US – Lamb Meat* suggests that the rapid increases contemplated in the Protocol too must be linked with, and related to, the level of injury specified in the Protocol. Because the Appellate Body has confirmed that the “serious injury” standard contained in the Safeguards Agreement “connotes a much higher standard of injury” than the term “material injury,”<sup>186</sup> its statements suggest that the “increasing imports” standard contained in the Protocol actually requires a lower level of “increased imports” than that expected in the context of the Safeguards Agreement.

99. China’s argument also overlooks the significant differences in the standards applicable to an “increased imports” finding required under the Safeguards Agreement and the “increasing rapidly” standard of the Protocol. In this regard, the Appellate Body has articulated a standard for the “increased imports” finding required under the Safeguards Agreement that is more stringent than the standard set forth in the Protocol. Under the Safeguards Agreement, the Appellate Body has stated that “the [requisite] increase in imports must have been recent enough, sudden enough, sharp enough, and significant enough, both quantitatively and qualitatively, to cause or threaten to cause “serious injury.”<sup>187</sup> Moreover, the Appellate Body has also indicated that any such increases must be the result of “unforeseen developments.”<sup>188</sup> In contrast, as we have already noted, the Protocol does not contain the “serious injury” or “unforeseen developments” standards that would require that the subject imports from China be “sudden,” “sharp,” or “significant” enough to cause “serious injury,” or that the increased imports be the result of “unforeseen developments” in the market. Instead, the Protocol only requires the increases in question be “rapid” enough to cause “material injury or threat of material injury” to the industry.<sup>189</sup> Given the significant substantive differences between the two standards, China’s reliance on the Appellate Body’s statements in the context of the Safeguards Agreement to establish the meaning of the “increasing rapidly” standard of the Protocol is misplaced.

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<sup>184</sup> *US – Steel Safeguards (AB)*, para. 346 (footnotes omitted) (emphasis added).

<sup>185</sup> In particular, the Protocol uses the “such” in paragraph 16.1 and the phrase “so as to be” in paragraph 16.4 to link the rapidly increasing imports to the concept of material injury.

<sup>186</sup> *US–Lamb Meat (AB)*, para. 124.

<sup>187</sup> *Argentina – Footwear (AB)*, para. 131.

<sup>188</sup> *US - Line Pipe (AB)*, para. 81.

<sup>189</sup> Protocol of Accession, para. 16.4.

**ii. The ITC Was Not Required to Obtain and Analyze Import Data for the First Quarter of 2009**

100. Finally, China also seeks to have the Panel impose an overly restrictive view of how “recent” imports increases should be under the Protocol. Under its interpretation of the Protocol, a competent authority may not simply find that imports from China were increasing during the “recent past.” Instead, China asserts that a competent authority can only meet the standards of the Protocol by focusing on the “most recent” past, and that the ITC failed to do so here by not examining import volume data for the quarter that ended just prior to the initiation of the investigation.<sup>190</sup> China’s argument is again misplaced. An analysis of the text of the Protocol, as well as consideration of Appellate Body reports under the Safeguards Agreement, indicates that the ITC was not required to obtain and analyze data for that period.

101. First, the Protocol does not require that the ITC obtain and analyze data for the “most recent” quarter that ends just prior to the beginning of its investigation. In fact, the Protocol imposes no specific requirement on a competent authority’s choice of investigatory period at all. Instead, the ITC is only obligated to use a period that “allows it to focus on the recent imports” and that is “sufficiently long to allow conclusions to be drawn regarding the existence of increased imports.”<sup>191</sup> The ITC’s choice of a five-year period of investigation, which ended less than four months before the beginning of its investigation, certainly satisfies this standard.

102. Second, the ITC actually explained why it chose not to seek data for the interim period that China now claims was necessary for a full consideration of these issues. In its determination, the ITC stated that it chose not to seek data for the first quarter of 2009 because “a relatively complete data set for that period would not have been available in time for use in this investigation.”<sup>192</sup> The ITC also explained that simply analyzing import data for the first quarter of 2009 would not have “probative value” because the ITC would not have been able to assess whether “the subject imports [were] increasing in relative terms in the absence of a data series that includes first quarter 2009 data on U.S. production and U.S. apparent consumption.”<sup>193</sup> In other words, the ITC explained why it was not reasonable to seek data for this period during the investigation.

103. Third, China has little analytical foundation for its claim that the Protocol itself required the ITC to obtain the quarterly data China would have preferred. In making this argument, China cites to language in the Protocol requiring a competent authority to assess whether imports from China “are being imported” into the importing Member so as to cause market disruption, and whether those imports “are increasing rapidly” so as to cause material injury, or threat of

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<sup>190</sup> China First Submission, paras. 111 and 136-154.

<sup>191</sup> See *US - Line Pipe (Panel)*, para. 7.201.

<sup>192</sup> ITC Report, p. 12, n.55. Exhibit US-1.

<sup>193</sup> ITC Report, p. 11. Exhibit US-1.

such injury, to an industry.<sup>194</sup> Relying on these highlighted phrases, China asserts that the text of the Protocol requires a competent authority to focus on a more recent period of time than does the Safeguards Agreement because the Safeguards Agreement provides only that “increased imports” have caused serious injury or a threat thereof to the industry.<sup>195</sup>

104. Again, China’s arguments are misplaced because the Protocol and the Safeguards Agreement contain similar language indicating how current import increases should be to satisfy their applicable standards. In this regard, the Protocol specifies that the competent authority should consider whether imports from China “are being imported . . . in such increased quantities or under such conditions as to cause or threaten to cause market disruption to the domestic producers. . . .” By way of comparison, the Safeguards Agreement requires a competent authority to assess whether a product “is being imported . . . in such increased quantities . . . and under such conditions as to cause or threaten to cause serious injury to the domestic industry. . . .”<sup>196</sup> There is no meaningful distinction between the language of these two provisions that indicates that a competent authority must focus its analysis on a more recent period under the Protocol than under the Safeguards Agreement. Instead, the language in the Protocol and the Safeguards Agreement suggest only that the competent authority must examine and consider “recent” trends in import increases, which is exactly what the ITC did here.<sup>197</sup>

105. Furthermore, China’s argument ignores the Appellate Body’s statements on this issue in the context of the requirements of the Safeguards Agreement. In *US – Steel Safeguards*, the Appellate Body stated:

Article 2.1 does *not* require that imports need to be increasing at the time of the determination. Rather, the plain meaning of the phrase “is being imported in such increased quantities” suggests merely that imports must have increased, and that the relevant products continue “being imported” in (such) increased quantities. We also do *not* believe that a decrease in imports at the end of the period of investigation would necessarily prevent an investigating authority from finding that, nevertheless, products continue to be imported “in such increased quantities.”<sup>198</sup>

In other words, when addressing this issue in the context of the Safeguards Agreement, the Appellate Body concluded that a decrease in imports at the end of a period would not prevent a finding that there were increases in imports sufficient to cause serious injury to the industry at issue. Given that the Protocol uses a similar term, that is, “are being imported in such increased

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<sup>194</sup> Protocol of Accession, paras. 16.1 and 16.4

<sup>195</sup> China First Submission, paras. 99-102.

<sup>196</sup> Compare paragraph 16. 1 of the Protocol of Accession with Article 2.1 of the Safeguards Agreement.

<sup>197</sup> ITC Report at 11. Exhibit US-1.

<sup>198</sup> *US – Steel Safeguards (AB)*, para. 367 (footnote omitted).

quantities,” when describing the increases needed to establish market disruption,<sup>199</sup> it seems clear that China’s claims about the ITC’s need to focus only on increases in the most recent period are misplaced.

106. In sum, China’s argument that only very recent increases in imports will satisfy the increased imports standard of paragraph 16 is unpersuasive. China’s interpretation finds no support in the text of paragraph 16 or in Appellate Body reports interpreting similar language in the Safeguards Agreement.

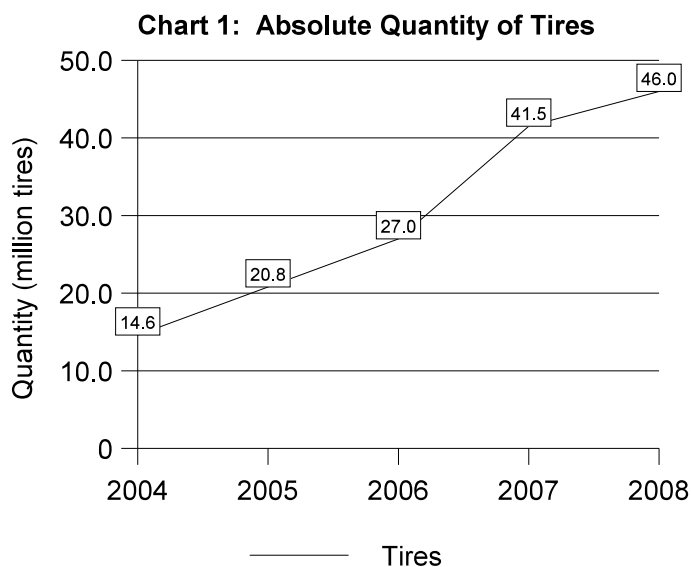
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<sup>199</sup> Protocol of Accession, para. 16.1.

## 2. The ITC Satisfied the “Rapidly Increasing” Imports Requirement of Paragraph 16 in this Case

107. Consistent with the “increasing rapidly” standard of the Protocol, the ITC analyzed the record evidence to determine whether the subject imports from China were “increasing rapidly, either absolutely or relatively, so as to be a significant cause of material injury, or threat of material injury, to the domestic industry.”<sup>200</sup> Moreover, in performing this analysis, the ITC stated, that the “rapid increase must be recent or continuing, as opposed to in the distant past.” Accordingly, it explained that it considered “the increase and rate of increase in subject imports,” focusing on “on recent increases in imports.”<sup>201</sup>

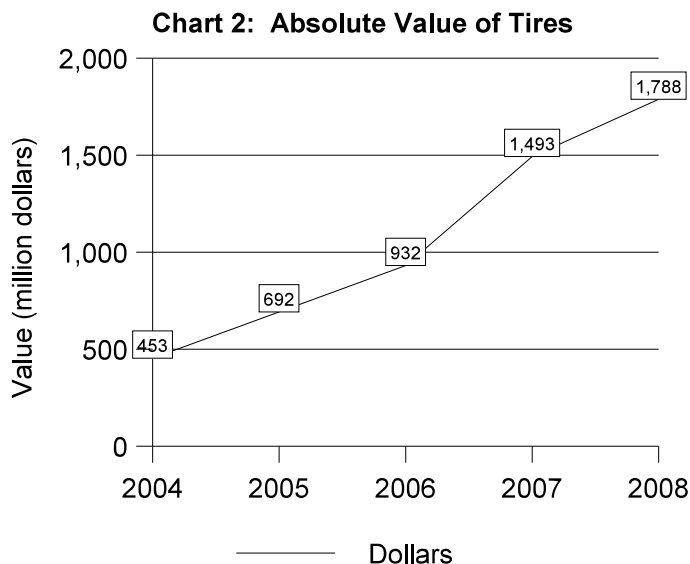
108. The ITC then explained why the subject imports from China were increasing rapidly over the period of investigation. In its analysis, the ITC found that the subject imports were increasing rapidly over the period, both in absolute and relative terms. In its analysis, it first considered the record evidence relating to the absolute quantities and value of imports, as shown in the following graphs:



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<sup>200</sup> ITC Report, p. 11-12. Exhibit US-1.

<sup>201</sup> ITC Report, p. 11. Exhibit US-1.



109. As the ITC observed, this data showed that the absolute quantities of the subject imports increased throughout the period of investigation, and were at their highest level in 2008, the final year of the period of investigation.<sup>202</sup> Specifically, the quantity of subject imports rose by 215.5 percent between 2004 and 2008, by 53.7 percent between 2006 and 2007, and by 10.8 percent between 2007 and 2008.<sup>203</sup> Moreover, the aggregate value of the subject imports from China rose even more rapidly during the period of investigation. As the ITC found, the value of the subject imports increased by 294.5 percent between 2004 and 2008. This growth included an increase of 60.2 percent between 2006 and 2007, and of 19.8 percent between 2007 and 2008.<sup>204</sup>

110. In its analysis, the ITC considered the record evidence relating to the relative levels of the subject imports, as shown in the following graph:<sup>205</sup>

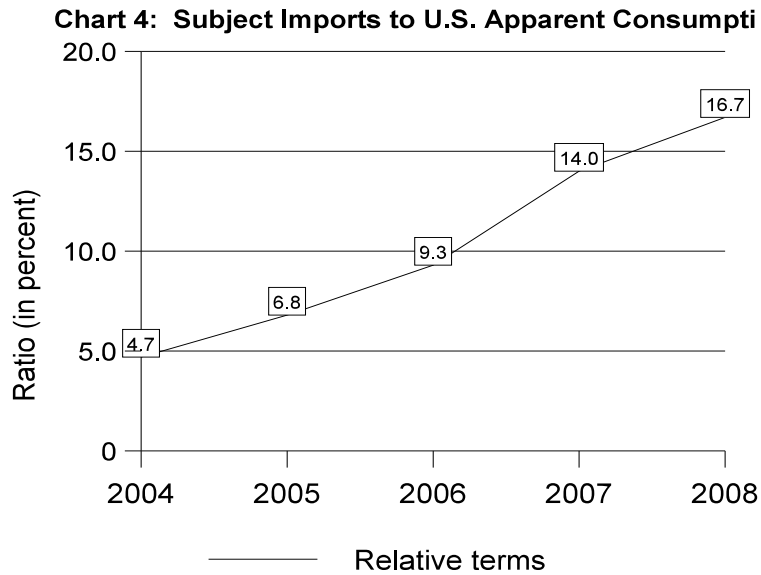
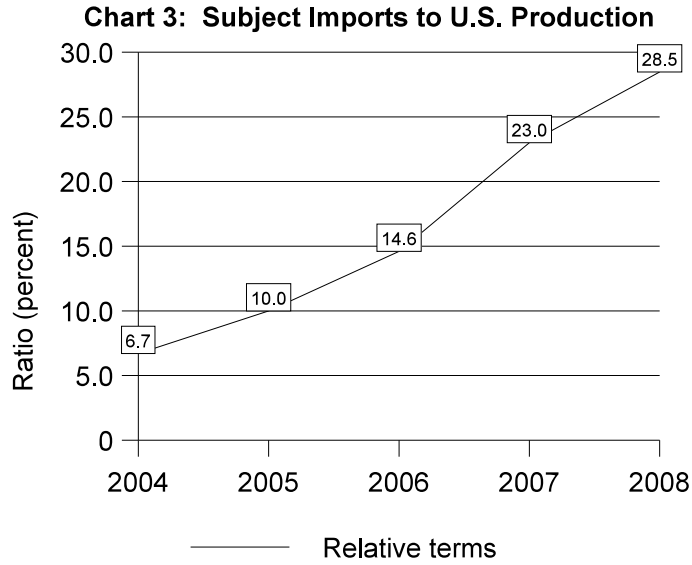
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<sup>202</sup> ITC Report, p.11-12 and 22. Exhibit US-1

<sup>203</sup> ITC Report, p.11-12 and 22. Exhibit US-1

<sup>204</sup> ITC Report, p. 11-12 and 22. Exhibit US-1

<sup>205</sup> Both graphs are based on relative quantity levels.



111. As the ITC correctly observed, the market share of the subject imports and the ratio of the subject imports to U.S. production both rose considerably throughout the period examined, with both metrics being at their highest levels in 2008.<sup>206</sup> The market share of the subject imports increased by 12.0 percentage points between 2004 and 2008, with the two largest year-to-year increases in market share occurring in 2007 and 2008, the final two years of the period.<sup>207</sup> The ratio of subject imports to U.S. production increased by 22.0 percentage points between 2004 and 2008, with the two largest year-to-year increases again occurring in 2007 and 2008, the end of the period.<sup>208</sup> Given these trends, the ITC reasonably found that imports were increasing rapidly over the entire period, including the final two years of the period.

112. Moreover, in coming to the conclusion that imports were increasing rapidly over the period, the ITC addressed and rejected the Chinese respondents' arguments that increases in the subject imports had been "gradual" or "small," and that the volumes of the subject imports "abated" by the end of the period.<sup>209</sup> Citing the import data summarized above, the ITC explained that the volumes of the subject imports had increased by significant amounts, on an absolute and relative basis, throughout each year of the period of investigation. The ITC also pointed out that subject import volumes were at their highest levels in 2008, the end of the period of investigation.<sup>210</sup> As the ITC stated:

Whether viewed in absolute or relative terms, and whether viewed in terms of the increase from 2007 to 2008 alone or the increase in the last two full years (or even the last three years), the increases were large, rapid, and continuing at the end of the period – and from an increasingly large base.<sup>211</sup>

In sum, the ITC provided a reasoned explanation of the basis for its finding that subject imports were increasing rapidly, absolutely and relatively, over the period of investigation. The ITC's analysis was fully consistent with the standard included in the Protocol.<sup>212</sup>

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<sup>206</sup> ITC Report, p. 12 and 22. Exhibit US-1.

<sup>207</sup> ITC Report, p. 12 and 22. Exhibit US-1. The market share of the subject imports increased from 9.3 percent in 2006 to 14.0 percent in 2007, and then to 16.7 percent in 2008. See ITC Report, Table C-1.

<sup>208</sup> ITC Report, p. 12 and 22. Exhibit US-1. The ratio of subject imports to U.S. production increased from 14.6 to 23.0 percent between 2006 and 2007, and then increased from 23.0 to 28.5 percent between 2007 and 2008. ITC Report, Table II-2.

<sup>209</sup> ITC Report, p. 12. Exhibit US-1.

<sup>210</sup> ITC Report, p. 12. Exhibit US-1.

<sup>211</sup> ITC Report, p. 12. Exhibit US-1.

<sup>212</sup> We note that, due to the nature of the analysis, the assessment of whether imports are increasing rapidly over the period of investigation is an assessment that should be performed on a case-by-case basis. See *US – Steel Safeguards (AB)*, para. 360. While any comparisons with the import trends at issue in other disputes is of limited value, we note that China has not cited a single dispute where an increase in imports as large and rapid as the increase in the *Tires* case was found to be insufficient to satisfy the increased imports standard of the Safeguards Agreement. Moreover, there have been disputes in which increases in imports that were smaller and less sustained



**3. China’s Claim that the ITC’s “Increasing Imports” Analysis Is Inconsistent with The Protocol Has No Merit**

**a. The ITC Reasonably Found That The Subject Imports Were Increasing Rapidly During the Recent Past**

113. China offers the Panel a variety of objections to the ITC’s finding. For example, in the section of its submission directly challenging the ITC’s findings, China alleges that the ITC failed to focus on year-to-year changes in import data trends, to emphasize sufficiently import trends for the most recent years of the period, to recognize that the increase was not “rapid” but “steady and stable”, and to collect sufficiently recent data on import volumes during the period.<sup>213</sup> In each case, however, there is no factual or legal basis for China’s arguments.

**i. The ITC Did Not Rely Exclusively on an “End-Point-to-End-Point Analysis**

114. First, China alleges that the ITC relied only on an “end-point-to-end-point” analysis of trends in import quantities and did not adequately analyze changes in those trends on a year-to-year basis.<sup>214</sup> China’s contention is demonstrably wrong. We have shown that the ITC applied the standard established in the Protocol. In so doing, it did not merely recite that there was a growth in imports between the first and last years of the period.<sup>215</sup> Instead, the ITC specifically considered the growth in the absolute and relative quantities for the subject imports during each year of the period of investigation,<sup>216</sup> and concluded that the “subject imports increased, both absolutely and relatively, throughout the period, by significant amounts in each year.”<sup>217</sup>

115. Furthermore, in its analysis, the ITC also cited and emphasized the increases in the relative and absolute quantities of subject imports that occurred in 2007 and 2008, which were the final years of the period.<sup>218</sup> With respect to these two years, the ITC concluded that, “whether viewed in absolute or relative terms, and whether viewed in terms of the increase from 2007 to 2008 alone or the increase in the last two full years. . . , the increases were large, rapid and

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were found to satisfy the “increased imports” standard set forth in the Safeguards Agreement. *E.g.*, *US – Steel Safeguards (Panel)*, paras. 10.212 and 10.220 (relative imports of cold-finished bar meet increased imports standard), 10.222 and 10.228 (absolute imports of rebar meet increased imports standard), 10.230 and 10.239 (absolute imports of welded pipe meet increased imports standard), 10.241 and 10.249 (relative imports of fittings, flanges, and tool joints meet increased imports standard), and 10.251 and 10.257 (relative imports of stainless steel bar meet increased imports standard).

<sup>213</sup> China First Submission, paras. 110-154.

<sup>214</sup> China First Submission, paras. 115.

<sup>215</sup> ITC Report at 11-12 and 22. Exhibit US-1

<sup>216</sup> ITC Report, p. 11-12, nn. 49-52 and 22, nn. 124-127. Exhibit US-1.

<sup>217</sup> ITC Report, p. 12. Exhibit US-1.

<sup>218</sup> ITC Report, p. 11-12. Exhibit US-1.

continuing at the end of the period.”<sup>219</sup> In other words, even a cursory review of the ITC’s analysis shows that the ITC did not simply focus on a comparison of import increases between the end-points of its investigation. On the contrary, the ITC conducted a thoughtful and nuanced analysis of the year-to-year trends in import quantities, as well as an analysis of trends between the first and final years of the period.<sup>220</sup>

116. In making this argument, China also seems to suggest that it was actually improper for the ITC to note the increases in imports between the first and final year of a period of investigation.<sup>221</sup> As a legal matter, China’s approach is mistaken. In its reports under the Safeguards Agreement, the Appellate Body has never stated that a competent authority should never examine or analyze trends in import increases between the end-points of an investigation.<sup>222</sup> In fact, in those reports, the Appellate Body has explained that, in the context of the Safeguards Agreement, the “competent authorities should not consider such data [from the most recent past] in isolation from the data pertaining to the entire period of investigation.”<sup>223</sup> Given this statement, it would appear that it is China that would prefer a methodology – that is, for the ITC to ignore import trends for all years other than the last year or two of the period – that runs afoul of the Appellate Body’s statements on this issue in other contexts.

117. The Appellate Body’s caution against a competent authority focusing exclusively on “end-point-to-end-point analysis” can best be understood by reviewing the facts of the *Argentina-Footwear* dispute. In that dispute, the record showed there had been a steady year-to-year decline in imports, on an absolute and relative basis, during the final two years of the period of investigation:

	1991	1992	1993	1994	1995
Total imports (million pair)	8.86	16.63	21.78	19.84	15.07
Relative Imports	12%	22%	33%	28%	25%

Source: *Argentina-Footwear*, Panel Report, paras. 8.151 and 8.273.

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<sup>219</sup> ITC Report, p. 12. Exhibit US-1.

<sup>220</sup> In its submission, China makes this same argument in several different ways. For example, China alleges that the ITC erred by noting that “imports were at their highest at the end of the period, explicitly comparing the end period to the beginning of the period,” by “downplaying” the “modest” increase in subject import volumes in 2008, or by “completely ignoring the year-by-year change in the actual quantity being imported from China.” Id. As we have discussed, these contentions are simply not correct. The ITC did not ignore any of the data relating to import trends; it analyzed the trends on a year-to-year and overall period basis, and specifically emphasized trends in the last two years of the period, including 2008. ITC Report, pp. 11-12 and 22.

<sup>221</sup> China First Submission, paras. 115-122.

<sup>222</sup> *Argentina-Footwear (AB)*, para. 129.

<sup>223</sup> *US– Lamb Meat*, AB Report, paras. 137 and 138.

Thus, as the Panel noted, the Argentine authority was only able to find that there had been an increase in imports by examining the first and last years of the period.<sup>224</sup> Since the record showed that imports had been declining over the last two years of the period, the Panel and Appellate Body found, the change in import trends did not satisfy the “increased imports” requirements of the Safeguards Agreement.

118. There is, of course, no question that the facts of this case show a very different trend in imports. As the ITC explained, the data on import quantities showed that, on an absolute and relative level, the increases in the subject imports were “large, rapid, and continuing” throughout the period, including the final years of the period examined by the ITC.<sup>225</sup> Put more starkly, there were increases in the import quantities of the subject imports, on both an absolute and relative basis, during each year of the period.<sup>226</sup> Indeed, the largest relative increases in import volumes occurred during the last two years of the period, 2007 and 2008.<sup>227</sup> The differences in trends between the two cases could not be more stark because the ITC did not depend on a comparison of the end points for the period of investigation to find that there was a rapid increase in import volumes.

**ii. The ITC Reasonably Found that Import Increases Had not Abated in 2008**

119. When challenging the ITC’s analysis, China focuses heavily in its submission on the increase in import volumes that occurred in 2008.<sup>228</sup> Noting that the rate of growth for the subject imports in this year lessened somewhat compared to the rate of growth in 2007, China claims that the decline in the rate of growth indicates that the subject imports were not actually increasing “rapidly” in that year but were moderating in that year,<sup>229</sup> and that a more sophisticated analysis would have established that its imports were only growing at a “stable” and “steady” rate.<sup>230</sup>

120. There is no merit to the idea that the ITC ignored these issues, or that it did not reasonably find that the growth in China’s imports was “rapid.” First, the ITC considered the same argument China is now raising and rejected the argument in its determination.<sup>231</sup> Noting that the Chinese respondents argued that imports from China were not “increasing rapidly” because they had “abated” by the end of the period, the ITC pointed out that the subject imports

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<sup>224</sup> *Argentina - Footwear (Panel)*, para.8.153.

<sup>225</sup> ITC Report, p. 12. Exhibit US-1.

<sup>226</sup> ITC Report, p. 11-12 & Table C-1. Exhibit US-1.

<sup>227</sup> ITC Report, p. 11-12 & Table C-1. Exhibit US-1.

<sup>228</sup> China First Submission, paras. 120-135.

<sup>229</sup> China First Submission, paras. 120-135.

<sup>230</sup> China First Submission, paras. 155-168.

<sup>231</sup> ITC Report, p. 12. Exhibit US-1.

had increased “by significant amounts” in each year of the period, that they had been “at their highest levels at the end of the period in 2008,” and that, on both an absolute and relative level, the increase in 2008 “alone” was a “large, rapid, and continuing” increase over the increase in their levels in 2007.<sup>232</sup> Given that the two highest increases in the market share of the subject imports and their ratio to domestic production occurred in 2007 and 2008, the ITC had a reasonable basis for finding that the increase in 2008 continued to be “large,” “rapid” and “significant.”

121. At its core, China’s argument is premised on the mistaken notion that the increase in import volumes in 2008 did not constitute a “rapid increase” under the Protocol because it was

not as large as the extremely rapid growth in imports in 2007.<sup>233</sup> The problem with this theory is that the Protocol does not require that subject imports be growing at an increasingly rapid rate at the end of the period, or that imports be increasing at a rate that is higher than the rate of growth of imports in any earlier point of the period.<sup>234</sup> In fact, the Protocol does not mention the word “rate” at all; it simply provides that the competent authority should establish that imports were “increasing rapidly”, on an absolute or relative basis.<sup>235</sup> In light of this, it does not matter that the subject imports may have increased at a smaller rate in 2008 than they did in 2007. The issue for this Panel is whether the ITC reasonably found that the data showed that the subject imports increased rapidly over the period, especially at the end.

122. And here, the data does exactly that. As the ITC pointed out:

- The subject imports from China grew significantly, in both absolute and relative terms, in each year of the period.
- The quantity of the subject imports increased by 215 percent between 2004 and 2008, and the market share of the subject imports more than tripled between 2004 and 2008.
- 60 percent of the growth in the absolute volumes of imports during the entire period of investigation occurred in 2007 and 2008, the final two years of the period of investigation.

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<sup>232</sup> ITC Report, p. 12. Exhibit US-1.

<sup>233</sup> China First Submission, paras. 120-135.

<sup>234</sup> Protocol of Accession, para. 16.4.

<sup>235</sup> Protocol of Accession, para. 16.4. In fact, as we have previously noted, the Appellate Body has confirmed that, under the standards of the Safeguards Agreement, a decline in volumes in the most recent period examined by the competent authority does not preclude the authority from making a finding of “increased imports” under the Agreement. *US – Steel Safeguards (AB)*, para. 367.

- 62 percent of the growth in the market share of the subject imports occurred in 2007 and 2008, the final two years of the period.
- The subject imports from China were at their highest levels, in absolute and relative terms, in 2008, the final year of the period. They were also the single largest import source for tires in that year.
- The annual increases in market share for the subject imports in 2007 and 2008 were the highest of the period of investigation, with 2007 being the highest annual increase and 2008 being the second highest annual increase.
- The annual increases in the ratio of subject import volume to domestic production were also at their highest level in 2007 and 2008, with 2007 being the highest annual increase and 2008 being the second highest annual increase.<sup>236</sup>

These facts clearly support the ITC’s findings that the imports from China were increasing rapidly at the end of the period of investigation.

### **iii. China’s Alternative Quarterly Analysis Is Flawed**

123. China also asks the Panel to disregard the ITC’s analysis and focus instead on a different methodology for evaluating the absolute and relative trends in the subject imports.<sup>237</sup> China places to the side all of import data for the years 2004, 2005, and 2006, and offers the Panel a quarterly break-out of the data that covers only two years, 2007 and 2008.<sup>238</sup> In China’s view, this quarterly data shows that, rather than increasing in 2007 and 2008, the subject imports went through a “mixture of increases and decreases” in their volumes during these quarters.<sup>239</sup>

124. Once again, China’s analysis contains a number of flaws. First, in its chart, China has excluded quarterly data for the years 2004, 2005, and 2006. The exclusion of this data completely obscures the fact that a higher volume of the subject imports were imported on a quarterly basis in 2007 and 2008 than during any quarter of the prior three years – 2004, 2005, and 2006. In fact, one need only review the chart set forth at paragraph 162 of China’s own submission – which contains quarterly import data for the entire period of investigation – to recognize that the quarterly quantities of the subject 2007 and 2008 were considerably higher than the quantities of those imports in 2004, 2005, and 2006.<sup>240</sup> By failing to include the data for these years in its chart, China has failed to provide the Panel with the data necessary to place the

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<sup>236</sup> ITC Report, pp. 11-12 and 22; Table C-1 and II-1. Exhibit US-1.

<sup>237</sup> China First Submission, para. 127.

<sup>238</sup> China First Submission, paras. 127-130.

<sup>239</sup> China First Submission, paras. 127-130.

<sup>240</sup> China First Submission, para. 162.

meaning of the quarterly data for 2007 and 2008 in the proper context. The Appellate Body has explained, in the context of the Safeguards Agreement, that the “competent authorities should not consider such data [from the most recent past] in isolation from the data pertaining to the entire period of investigation” precisely because doing so does not provide an adequate context for analysis.<sup>241</sup> Yet that is exactly what China is attempting to do here.

125. Second, by asking the Panel to review its quarterly data, China appears not to recognize that quarterly data has the potential to introduce distortions that do not typically exist in annual data. Unlike annual data, variations in production schedules, weather developments, and seasonal demand can affect what is produced and sold by an industry in any given month or quarter.<sup>242</sup> It is for this reason that, when the ITC obtains and analyzes interim data in its own investigations, it does not compare changes in import or industry trends between succeeding fiscal quarters. Instead, the ITC always compares its quarterly or interim data for comparable quarters at the same time of year.<sup>243</sup> Specifically, the ITC will compare interim data for the first quarter of a year with the data for the first quarter of the next year. Similarly, when comparing interim data for a half year period, the ITC will compare data for the first half of one year to data for the first half of the next year. By doing so, the ITC is able to minimize the possibility of comparing quarterly data that may reflect seasonal or other variations in demand or production.

126. If China had performed a similar comparison of the quarterly data in its submission, it would have realized that the data show quite a different story than the one China tells. A comparison of the data for comparable quarters for 2007 and 2008 actually shows that there were typically significant increases in quarterly import quantities between 2007 and 2008. In particular, a comparison of the quarterly data shows the following:

- The quantity of subject imports in the first quarter of 2008 was 23 percent higher than in the first quarter of 2007.
- The quantity of imports in the second quarter of 2008 was 13.9 percent higher than the second quarter of 2007.
- The quantity of the subject imports in the third quarter of 2008 was 9.3 percent higher than the third quarter of 2007.

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<sup>241</sup> *US–Lamb Meat (AB)*, paras. 137 and 138.

<sup>242</sup> These temporary or seasonal effects are less likely to affect the annual data for 2007 and 2008 than the ITC collected and relied on here.

<sup>243</sup> *E.g., Circular Welded Non-alloy Steel Pipe from China*, Inv. No. TA-421-6, USITC Pub. 3807 (October 2005) at pp. I-21, II-2, & III-8, Exhibit US-8; *Certain Steel Wire Garment Hangers from China*, Inv. No. TA-421-2, USITC Pub. 3575 (Feb. 2003) at pp. I-15, I-25 & I-26. Exhibit US-9.

- The quantity of the subject imports in the fourth quarter of 2008 was essentially the same (less than 1 percent smaller) than the fourth quarter of 2007.<sup>244</sup>

In other words, even China’s own quarterly data show a continued and significant increase in the quantities of the subject imports between 2007 and 2008.

127. Finally, China’s reliance on the quarterly data is misplaced because China’s data only shows changes in the absolute levels of the Chinese imports. However, the Protocol allows a determination of market disruption if imports from China are increasing rapidly on an absolute or relative basis.<sup>245</sup> Although China has provided quarterly data for import quantities on an absolute basis, it has not provided any data (such as U.S. production, shipment, or consumption data) that would allow the Panel to assess import quantities on a relative basis during the first quarter of 2008. As a result, the absolute quantity data provided by China is necessarily incomplete. In sum, China’s quarterly data comparisons do not undermine the ITC’s own analysis of annual import data.

#### **iv. China’s Other Challenges Are Unfounded**

128. China also argues that the ITC improperly examined the increasing value of the subject imports in its analysis.<sup>246</sup> According to China, the ITC’s analysis of value trends was improper because paragraph 16.1 provides that a competent authority need only examine the “quantity” of imports.<sup>247</sup> While the Protocol does indicate the authority should assess the “quantities” of imports – which the ITC did here – it does not prohibit a competent authority from also considering in its analysis the values of the subject imports. In fact, by considering the value of the imports, the ITC was able to perform a more sophisticated analysis of the overall effects of the subject imports from China on the industry, an analysis that was consistent with the text of the Protocol. In this regard, the ITC’s consideration of import values is in keeping with the language of the Protocol, indicating that an authority may consider the “conditions” under which imports from China are competing in the market.<sup>248</sup> It is, moreover, consistent with the Protocol’s instruction that the competent authority consider the “effects” of such imports “on the domestic industry” and the industry’s “prices.”<sup>249</sup> It would seem, then, that it is China, not the ITC, that prefers a more simplistic approach.

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<sup>244</sup> China First Submission, para. 127.

<sup>245</sup> Protocol of Accession, para. 16.4.

<sup>246</sup> China First Submission, para. 116.

<sup>247</sup> China First Submission, para. 116.

<sup>248</sup> Protocol of Accession, para. 16.1.

<sup>249</sup> Protocol of Accession, para. 16.4.

129. China also argues that the ITC ignored that the increase in Chinese imports occurred from a “low base level” at the beginning of the period.<sup>250</sup> There are two problems with China’s claim. First, the quantities of Chinese imports in the market at the beginning of the period were not particularly small. In 2004, the first year of the period, imports from China occupied almost five percent of the market and were the fourth largest import source for tires in that year, following only Canada, Japan and Korea.<sup>251</sup> Second, the ITC considered and rejected the claims of the Chinese respondents that, on the whole, the increases in the subject imports were “small” or “gradual.”<sup>252</sup> As the ITC stated, the actual growth in the subject imports, on both a relative and absolute level, was significant each year of the period and continued to be “large, rapid and continuous,” even at the end of the period.<sup>253</sup> In fact, by the end of the period, the record data showed that China had grown from being the fourth largest exporter of tires to the United States to the largest exporter, by a significant margin.<sup>254</sup> Thus, whether or not imports from China were small at the beginning of the period, the ITC properly concluded that they had become a large presence in the market at the end of the period.<sup>255</sup>

**b. The ITC’s Decision Not to Seek Data for the First Quarter of 2009 Was Not Inconsistent With Its Established Practice**

130. Finally, China asserts that the ITC should have analyzed import data for the first quarter of 2009. According to China, if the ITC had done so, it would have recognized that imports were no longer increasing rapidly. In addition, China asserts that the ITC’s decision not to collect such data was inconsistent with its established practice in these and other investigations and suggests that the ITC did not collect this data so as to ensure it found that imports were increasing rapidly during the period. None of these arguments have merit.

131. First, as we previously noted, China’s argument that the Protocol itself indicates that the ITC should collect data for the first quarter of 2009 is flawed as a legal matter. As we have previously stated, an analysis of “recent” imports requires the ITC only to use a period that

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<sup>250</sup> China First Submission, paras. 117.

<sup>251</sup> ITC Report, Table C-1 and II-1. Exhibit US-1.

<sup>252</sup> ITC Report, p. 11. Exhibit US-1.

<sup>253</sup> ITC Report, p. 12. Exhibit US-1.

<sup>254</sup> ITC Report, table II-1. Exhibit US-1.

<sup>255</sup> We note that China also mistakenly claims that WTO panels and the Appellate Body have consistently found that the ITC has not been conducting a “sufficient analysis of this issue” in global safeguards cases. This is not true. In fact, the ITC’s findings of “increased imports” have been upheld in several situations under the Safeguards Agreement by panels, in decisions that were not appealed to the Appellate Body (on this issue). *US – Line Pipe (Panel)*, paras. 7.205, 7.210, and 7.213; *U.S. – Steel Safeguards, (Panel)*, paras. 10.212 and 10.220 (relative imports of cold-finished bar meet increased imports standard), 10.222 and 10.228 (absolute imports of rebar meet increased imports standard), 10.230 and 10.239 (absolute imports of welded pipe meet increased imports standard), 10.241 and 10.249 (relative imports of fittings, flanges, and tool joints meet increased imports standard), and 10.251 and 10.257 (relative imports of stainless steel bar meet increased imports standard).



“allows it to focus on the recent imports” and that is “sufficiently long to allow conclusions to be drawn regarding the existence of increased imports.”<sup>256</sup> The ITC’s choice of a five-year period of investigation, which ended less than four months before the beginning of its investigation, satisfies this standard.

132. Second, the ITC does not have a practice of collecting data for any fiscal quarter that is completed before the beginning of its investigation, as China asserts. Instead, the ITC has an established practice in investigations under Section 421 of collecting, at a minimum, five full years of data, plus for any interim period that can reasonably be collected, when conducting its investigations.<sup>257</sup> The ITC decides, on a case-by-case basis, whether to attempt to collect data for the “interim period,” which is the most recently completed period of less than a full calendar year.<sup>258</sup> When making this decision, the ITC considers a number of factors, including the time elapsed between the end of the most recent quarter and the issuance of its questionnaires, the likelihood of obtaining full information from the parties for the interim period, and the number of parties from whom data must be sought. The ITC is less likely to seek data for a particular quarter if a relatively small amount of time has elapsed between the end of the quarter and the beginning of the investigation, if participants in the market are not likely to provide meaningful data within the time period provided for response, or if the number of market participants is large enough that the ITC is not likely to obtain reasonably complete industry-wide data within the period allotted.

133. In the *Tires* investigation, the ITC did not seek data for the first quarter of 2009 because only 20 days had elapsed since the end of that quarter when the petition was filed and the staff began preparing questionnaires. Moreover, the ITC recognized that it needed to obtain any industry-wide data from a reasonably large number of market participants, which ultimately was determined to include 10 U.S. producers, 35 importers and 36 foreign producers of the subject tires. As the ITC stated in its determination, it concluded that it would not seek data for the first quarter of 2009 because it believed that “a relatively complete data series for that period would not have been available in time for use in this investigation.”<sup>259</sup>

134. Moreover, in response to the claim by the importers that the ITC should nonetheless analyze available import data for the first quarter of 2009, the ITC explained that analyzing import data for first quarter of 2009 alone would not have “probative value” because the ITC would not have been able to assess whether “the subject imports [were] increasing rapidly in relative terms in the absence of a data series that includes first quarter 2009 data on U.S.

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<sup>256</sup> See *US - Line Pipe (Panel)*, para. 7.201.

<sup>257</sup> E.g., *Circular Welded Non-alloy Steel Pipe from China*, Inv. No. TA-421-6, USITC Pub. 3807 (October 2005) at pp. I-21, II-2, & III-8, Exhibit US-8; *Certain Steel Wire Garment Hangers from China*, Inv. No. TA-421-2, USITC Pub. 3575 (Feb. 2003) at pp. I-15, I-25 & I-26. Exhibit US-9.

<sup>258</sup> This period is typically measured in quarters.

<sup>259</sup> ITC Report, p. 12, n.55. Exhibit US-1

production and U.S. apparent consumption.”<sup>260</sup> Thus, the ITC made this decision the same way it does in any investigation when assessing what data it should collect; it did so on the basis of the facts and circumstances before it.

135. Therefore, it is not true that the ITC’s decision not to collect interim data in the *Tires* case was at odds with the ITC’s practice in other cases. China asserts that the ITC has “collected interim data in every single other Section 421 safeguard investigation in which an interim period was completed prior to the filing of the petition.”<sup>261</sup> China fails to mention that, in these five cases, the period of time that elapsed between the end of the most recent quarter and the filing of the petition ranged from 33 to 67 days.<sup>262</sup> In other words, in every one of the five Section 421 investigations cited by China, the period between the end of the quarter and the beginning of the investigation was considerably longer than the 20 days that elapsed between these events in the *Tires* investigation.

136. China correctly notes that, in the section 421 investigation involving *Uncovered Innerspring Units from China*, the ITC did choose to collect data for the entire previous year, even though the petition was filed just six days after the end of that year.<sup>263</sup> China fails to recognize, however, that the ITC chose to collect data for the full year just before the beginning of its investigation because the alternative – collecting five years of data plus two sets of data for nine-month interim periods – would have imposed a more significant burden on all of the market participants in that investigation.<sup>264</sup> As the Panel can understand, the ITC reasonably concluded that asking parties to provide only a set of data for one full year, as opposed to three sets of data for a full year and two interim periods, was likely to place a significantly lower reporting burden on market participants.<sup>265</sup>

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<sup>260</sup> ITC Report, p. 11. Exhibit US-1.

<sup>261</sup> China First Submission, para. 139 (emphasis in original).

<sup>262</sup> Exhibit US-11.

<sup>263</sup> China First Submission, para. 139

<sup>264</sup> As we previously explained, the ITC has established a practice in investigations under Section 421 of collecting, at a minimum, five full years of data, plus for any interim period that can reasonably be collected, when conducting its investigations. *E.g.*, *Circular Welded Non-alloy Steel Pipe from China*, Inv. No. TA-421-6, USITC Pub. 3807 (October 2005) at pp. I-21, II-2, & III-8, Exhibit US-8; *Certain Steel Wire Garment Hangers from China*, Inv. No. TA-421-2, USITC Pub. 3575 (Feb. 2003) at pp. I-15, I-25 & I-26. Exhibit US-9.

<sup>265</sup> In the Innersprings investigation, the ITC collected data for five full years, 1999, 2000, 2001, 2002, and 2003. *Uncovered Innerspring Units from China*, Inv. No. TA-421-5, USITC Pub. 3676 at I-12, III-7-8 (March 2004). If the ITC had chosen to collect data only through the third quarter of 2003, then it would have had to collect data for seven, rather than five reporting periods: 1998, 1999, 2000, 2001, and 2002, plus interim data for the first three quarters of 2003 and the first three quarters of 2002. This would obviously have increased the burden considerably on all respondents. Exhibit US-10.

137. China also alleges that the ITC’s decision was not consistent with the agency’s practice in antidumping and countervailing duty investigations.<sup>266</sup> This is not correct. The ITC’s case-by-case analysis of the availability and usefulness of interim period data means that it does not apply a strict numerical threshold. Thus, it is not relevant to observe, as China does, that “during 2009, the USITC collected interim data in all investigations so long as at least one 2009 quarter had been completed prior to the petition being filed.”<sup>267</sup> Whether a quarter has ended is only one of the factors that the ITC considers when deciding how to collect data for a particular interim period. In fact, for 10 of the 11 preliminary-phase investigations that occurred in 2009,<sup>268</sup> the period of time that elapsed between the end of the most recent quarter and the filing of the petition ranged 29 to 100 days.<sup>269</sup> In other words, these cases are not analogous to the *Tires* investigation because the time that elapsed between the end of the quarter and the filing of the petition was considerably longer than the 20 days between the end of the quarter and the filing of the petition in the *Tires* case.

138. China also cites two other preliminary antidumping /countervailing investigations from before 2009 where the ITC collected interim data for investigations that began less than 20 days after the end of an interim quarter. Again, the ITC’s collection of this data in these investigations does not establish that the ITC has a practice of collecting such data when the quarter ends before the filing of the petition. On the contrary, there have been a number of preliminary antidumping/countervailing duty investigations in which an petition was filed more than 20 days after the end of a quarter and the ITC did not collect data for that quarter.<sup>270</sup> These examples serve only to demonstrate that the decision to seek interim period data depends on the nature and complexities of the relevant investigation, with the length of time between the filing of the petition and the end of the quarter being only one consideration. China’s allegation that the ITC’s data collection in *Tires* is “inconsistent with established practice” has no merit.

139. China also has no basis for its arguing that the ITC chose not to collect data for the first quarter of 2009 in order to manipulate the results of its “increasing imports” analysis.<sup>271</sup> First of all, when the ITC chose not to seek this data, it had no way of knowing what impact it would have on the ultimate results of its investigation, since the ITC had not yet issued its questionnaires to parties or received any responses. As a result the ITC made its decision before it could have known what the import market share or ratios to domestic production would be.

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<sup>266</sup> China First Submission, para. 140.

<sup>267</sup> China’s First Submission, para.140.

<sup>268</sup> The one exception is the investigation involving Oil Country Tubular Goods from China, where there were only seven domestic producers, and where the petitioning firms accounted for most of domestic production *Oil Country Tubular Goods from China*, Inv. Nos. 701-TA-463 and 731-TA-1159 (Preliminary), USITC Pub. 4081 at p. III-1 (June 2009). Exhibit US-12.

<sup>269</sup> Exhibit US-13.

<sup>270</sup> Exhibit US-14.

<sup>271</sup> China First Submission, paras. 142-146.

Therefore, China cannot seriously be arguing that the ITC chose not to collect this data because it “knew” the data would affect its ultimate conclusion.

140. Similarly, China mistakenly asserts that the ITC could have issued supplemental questionnaires in order to obtain the necessary data for the first quarter of 2009.<sup>272</sup> China points out that the ITC did, in fact, issue supplemental questionnaires during the course of the investigation when it concluded that it was necessary to do so. However, the supplemental questionnaires in question did not seek the same sort of comprehensive statistical data that would have been necessary to perform an “increasing imports” analysis for the first quarter of 2009. Instead, the supplemental questionnaires sought the views of tire producers and importers on the very limited issue of market segmentation and included a relatively small number of questions. It would have been an altogether different matter if the ITC had decided to seek full data on the production, shipments, sales, employment, financial performance, product pricing, import data, and other statistical factors from all participants in the market for the recently completed quarter at a late stage of the investigation.

141. China also contends that the ITC should have used the available import data for the first quarter of 2009, even though it had not collected data for that quarter.<sup>273</sup> As the ITC explained in its determination, however, analyzing the available import data for the first quarter 2009 would not been particularly “probative” because the ITC did not have the data needed to assess whether “the subject imports [were] increasing in relative terms in the absence of a data series that includes first quarter 2009 data on U.S. production and U.S. apparent consumption.”<sup>274</sup> Although China argues that the ITC’s “inability to address one issue completely does not justify ignoring probative data on another issue,”<sup>275</sup> the ITC’s ability to determine whether imports were increasing on a relative basis was a necessary component of its “increasing imports” analysis. Even if the available data showed that imports were declining on an absolute level during the first quarter of 2009, the ITC would still not have been able to conclude that imports were not increasing rapidly overall because it could not assess whether they were increasing rapidly on a relative basis.

142. Furthermore, we note that China’s specific factual argument about the first quarter of 2009 is itself misleading. China observes that import quantities in the first quarter of 2009 were lower than in any quarter since the second quarter of 2007.<sup>276</sup> However, its table omits information for prior quarters showing that the quantity of subject imports during the first quarter of 2009 was actually 5.6 percent higher than the quantity of the subject imports during the first

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<sup>272</sup> China First Submission, para. 145.

<sup>273</sup> China First Submission, para. 146.

<sup>274</sup> ITC Report, p. 11. Exhibit US-1

<sup>275</sup> China First Submission, para. 148.

<sup>276</sup> China First Submission, para. 150.

quarter of 2007,<sup>277</sup> and considerably larger than in any single quarter during 2004, 2005, and 2006.<sup>278</sup>

143. Finally, even if the data for the first quarter of 2009 had been available and had shown that imports were declining on an absolute and relative level during the quarter, this still would not have required the ITC to find that subject imports were not increasing rapidly during the period. As we have noted, the Appellate Body has explained, in the context of the Safeguards Agreement, that a decrease in imports at the end of a period of investigation does not necessarily prevent an investigating authority from finding that products continue to be imported “in such increased quantities.”<sup>279</sup> Moreover, other panels have found the increased imports standard of the Safeguards Agreement to have been satisfied even where imports were declining on both an absolute and a relative basis in the most recent interim period.<sup>280</sup> Given that a decline in imports in the most recent interim period does not prevent an investigating authority from finding that products continue to be imported “in such increased quantities” under the Safeguards Agreement, then there is no basis for concluding that a different result must be required in the context of the Protocol.

#### **4. Conclusion**

144. The ITC provided an adequate and reasoned explanation of how the increased imports requirement of paragraph 16 was satisfied in this case. By any measure, the increase in subject imports was sufficient so as to be a significant cause of material injury to the U.S. tire industry.

#### **C. The ITC’s Causation Analysis Was in Accordance with the Requirements of the Protocol**

145. The ITC’s causation analysis was fully in accordance with paragraphs 16.1 and 16.4 of the Protocol. First, despite China’s claim to the contrary, the causation standard of the U.S. statute is not inconsistent as such with paragraphs 16.1 and 16.4 of the Protocol. On the contrary, the U.S. statutes tracks, on an almost verbatim basis, the language contained in paragraphs 16.1 and 16.4 of the Protocol. The definition of “significant cause” with which China takes issue merely serves to provide guidance to the U.S. competent authority that is wholly consistent with the Protocol.

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<sup>277</sup> China First Submission, para. 149.

<sup>278</sup> China’s First Submission, para. 162.

<sup>279</sup> *US – Steel Safeguards (AB)*, para. 367; see also *US – Line Pipe (Panel)*, para. 7.207.

<sup>280</sup> *E.g.*, *US – Steel (Safeguards) (Panel)*, paras 10.221-10.228 (rebar); *see also*, paras. 10.229-10.239 (welded pipe), paras. 10.250-10.257 (stainless steel bar) (increased imports requirement satisfied with respect to each of these products despite declining imports in interim period).

146. Secondly, the ITC’s analysis of the causal link between rapidly increasing imports from China and the industry’s declining condition is also fully consistent, as applied, with the provisions of paragraphs 16.1 and 16.4 of the Protocol. As we will discuss below, the ITC objectively and thoroughly analyzed the record evidence on these issues and established, clearly and unambiguously, that rapidly increasing imports from China were a significant cause of material injury to the domestic industry.

147. We discuss these issues below.

**1. The Causation Standard of the U.S. Implementing Statute Is Fully Consistent With the Provisions of the Protocol**

148. China claims that the causation standard of the U.S. implementing statute is, as such, inconsistent with paragraphs 16.1 and 16.4 of the Protocol.<sup>281</sup> As we have already established, China bears the burden of proof. The Appellate Body has clearly stated that “a responding Member’s law will be treated as WTO-consistent until proven otherwise.”<sup>282</sup> Thus, the “party asserting that another party’s municipal law, as such, is inconsistent with relevant treaty obligations bears the burden of introducing evidence as to the scope and meaning of such law to substantiate that assertion.”<sup>283</sup>

149. It is not enough for the complaining party to allege that the statute might possibly be interpreted and applied in a manner that is inconsistent with the Member’s obligations under the WTO Agreement.<sup>284</sup> In fact, even if the statute explicitly directs an authority to take action inconsistent with the WTO Agreement, a WTO panel may still find that the statute is consistent as such with the Agreement if the statute permits the competent authority to avoid taking such action.<sup>285</sup> To prevail, China would have to be able to establish that the U.S. statute specifically mandates that the ITC take action in a manner that is inconsistent with the Protocol.<sup>286</sup>

150. Accordingly, the appropriate inquiry for this proceeding is whether the United States’ implementing legislation “mandates action that is inconsistent with the United States’ obligations” under the Protocol of Accession.<sup>287</sup> Since the United States’s implementing statute is, in fact, fully consistent with the provisions of paragraphs 16.1 and 16.4 of the Protocol, China cannot carry its burden on this issue.

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<sup>281</sup> China First Submission paras. 169-207.

<sup>282</sup> *US – German Steel (AB)*, para. 157. *US - Shirts and Blouses (AB)*, p. 14.

<sup>283</sup> *US – German Steel (AB)*, para. 157; *India – Duties (AB)*, para. 160; *US - Shirts and Blouses (AB)*, p. 14.

<sup>284</sup> *Id.*

<sup>285</sup> *US – Superfund*, para. 5.2.9.

<sup>286</sup> *US – 1916 Act (AB)*, paras. 88 - 89.

<sup>287</sup> *US – Hot-Rolled Steel (Panel)*, para. 7.193.

**a. The U.S. Statute Is Fully Consistent with Paragraphs 16.1 and 16.4 of the Protocol**

151. China alleges that the causation standard incorporated in the U.S. implementing statute, codified at 19 U.S.C. §2451(c), is inconsistent with the provisions of paragraphs 16.1 and 16.4 of the Protocol. As China acknowledges in its submission, however, the U.S. implementing statute incorporates, on an almost “verbatim” basis, the operative language of paragraphs 16.1 and 16.4 of the Protocol.<sup>288</sup> Given that the U.S. statute tracks the exact language of the pertinent causation provisions of the Protocol and contains no language that is actually inconsistent with the language in paragraphs 16.1 and 16.4, it is difficult to see how China could establish that the statute requires the ITC to act inconsistently with the requirements of these paragraphs.<sup>289</sup> As a result, China’s “as such” claim must fail.

**i. Paragraphs 16.1, 16.3 and 16.4 of the Protocol of Accession**

152. An analysis of China’s “as such” claim must begin, of course, with the pertinent language of paragraphs 16.1 and 16.4 of the Protocol of Accession. Paragraph 16.1 of the Protocol of Accession provides that a WTO Member “may request consultations with China with a view to seeking a mutually satisfactory solution” of the matter when:

[P]roducts of Chinese origin are being imported into the territory of any WTO Member in such increased quantities or under such conditions as to cause or threaten to cause market disruption to the domestic producers of like or directly competitive products.

Paragraph 16.3 of the Protocol further provides that, if these consultations do not result in a resolution of the matter within 60 days, the affected Member shall be free, in respect of such products, to withdraw concessions or otherwise limit imports “to the extent necessary to prevent or remedy such market disruption.”<sup>290</sup>

153. Paragraph 16.4 of the Protocol also provides a specific definition of the term “market disruption,” as that phrase is used in paragraphs 16.1 and 16.3 of the Protocol. In paragraph 16.4, the Protocol states that:

Market disruption shall exist whenever imports of an article, like or directly competitive with an article produced by the domestic industry, are increasing rapidly, either absolutely

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<sup>288</sup> China First Submission para. 194.

<sup>289</sup> *US – Hot-Rolled Steel (Panel)*, para. 7.193.

<sup>290</sup> Protocol of Accession, paragraph 16.3.

or relatively, so as to be a significant cause of material injury, or threat of material injury to the domestic industry.<sup>291</sup>

Paragraph 16.4 further provides that, “[i]n determining if market disruption exists, the affected WTO Member shall consider objective factors, including the volume of imports, the effect of imports on prices for like or directly competitive articles, and the effect of such imports on the domestic industry producing like or directly competitive products.”<sup>292</sup>

154. The Protocol of Accession imposes no other substantive analytical requirements on the affected Member as a precondition to a finding that imports from China are causing market disruption.<sup>293</sup> Notably, the Protocol does not define the term “significant cause,” as that term is used in paragraph 16.4. Thus, Members remain free to adopt methodologies or standards to determine whether imports from China are a significant cause of material injury as long as the as the methodologies or standards are not inconsistent with the Protocol.

155. The text does contain language indicating the conditions under which a competent authority may find that imports from China are a “significant cause” of material injury or threat thereof. Paragraph 16.4 specifically provides that “market disruption shall exist” whenever rapidly increasing imports from China are “a significant cause of material injury, or threat of material injury” to a domestic industry.<sup>294</sup> By stating that imports from China can be “a significant cause” of material injury or threat to an industry, the text of the Protocol establishes that there may be multiple significant causes of material injury or threat to an industry during the period in question.

156. It is noteworthy that neither paragraph 16.1 nor paragraph 16.4 of the Protocol contain language specifying that, under the Protocol, a Member must be able to establish that imports from China are the “sole,” “primary,” or “most important” cause of injury to the domestic industry as a condition for finding that “market disruption” exists<sup>295</sup>. The absence of such a standard confirms that the transitional mechanism under paragraph 16 is available when imports from China are one, but not the only, significant cause of material injury.

157. In the context of the Safeguards Agreement, the Appellate Body has stated that, when assessing whether there is a “causal link” between imports and injury, a competent authority need only establish that there is a “relationship of cause and effect such that increased imports contribute to ‘bringing about,’ ‘producing,’ or ‘inducing’” the requisite level of injury.”<sup>296</sup>

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<sup>291</sup> Protocol of Accession, Paragraph 16.4.

<sup>292</sup> Protocol of Accession, paragraph 16.4.

<sup>293</sup> See generally Protocol of Accession, paragraph 16.

<sup>294</sup> Protocol of Accession, paragraph 16.4.

<sup>295</sup> See generally Protocol of Accession, paragraph 16.

<sup>296</sup> *US – Wheat Gluten (AB)*, para. 67; *US – Lamb Meat (AB)*, para. 166.



Accordingly, it follows that, under paragraph 16.4, imports from China can be one of several “significant causes” that contribute to the overall level of material injury or threat of injury being suffered by an industry.<sup>297</sup>

158. Finally, neither the Protocol nor the Report of the Working Party on China’s accession to the WTO contains any language linking the causation standards of paragraph 16 of the Protocol to the causation standards set forth in the Safeguards Agreement.<sup>298</sup> Thus, nothing in the Protocol or the Report of the Working Party instructs or implies that the competent authority needs to satisfy a more demanding, strict, or stringent showing of the “causal link” between imports from China and material injury than that specified in the Safeguards Agreement or the Antidumping or Subsidies Agreements, as China claims throughout its submission.<sup>299</sup> In fact, the absence of restrictions, such as the non-attribution language of Article 4.2(b) of the Safeguards Agreement suggests that the threshold for application of a measure under the transitional mechanism is lower.

159. In sum, as long as a Member considers the three “objective factors” involving the “volume of [the Chinese] imports,” the “effect of imports on prices for like or directly competitive articles, and the “effect of such imports on the domestic industry,” and reasonably concludes these factors establish that the imports from China are “increasing rapidly, either absolutely or relatively, so as to be a significant cause of material injury, or threat of material injury to the domestic industry,” the Member is entitled to conclude that “market disruption,” as defined in paragraph 16.4 of the Protocol, exists.<sup>300</sup> Simply put, there is nothing on the face of the Protocol that limits, restricts or otherwise circumscribes a Member’s authority to draw such a conclusion, should the record before the competent authority warrant it.

**ii. The U.S. Implementing Statute is Fully Consistent with Paragraphs 16.1 and 16.4 of the Protocol**

160. The United States enacted its implementing legislation for the transitional mechanism contained in paragraph 16 of the Protocol of Accession in 2000.<sup>301</sup> In that legislation, the U.S. Congress adopted, on a nearly verbatim basis, the specific causation standards included in paragraphs 16.1 and 16.4 of the Protocol, a fact that China acknowledges in its submission.<sup>302</sup>

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<sup>297</sup> Protocol of Accession, paragraph 16

<sup>298</sup> See generally Protocol of Accession, paragraph 16; Report of the Working Party on the Accession of China, WT/ACC/CHN/49, paras. 245-250.

<sup>299</sup> *Id.*

<sup>300</sup> Protocol of Accession, paragraph 16.4.

<sup>301</sup> 19 U.S.C. §2451. Exhibit US-3.

<sup>302</sup> China First Submission, para. 194.

China has provided no viable basis for finding that the U.S. statute mandates action that is inconsistent with the requirements of these paragraphs of the Protocol.<sup>303</sup>

161. First, the U.S. statute incorporates the operative causation language of paragraph 16.1 in all pertinent respects by using language that is nearly identical to that used in paragraph 16.1. Specifically, section 2451(a) of the statute provides that the President may impose a transitional remedy on imports of a product from China if the product is:

being imported into the United States in such increased quantities or under such conditions as to cause or threaten to cause market disruption to the domestic producers of a like or directly competitive product.<sup>304</sup>

This language is identical in all pertinent respects to the causation language contained in paragraph 16.1.<sup>305</sup>

162. Similarly, the U.S. statute incorporates the same definition of “market disruption” as in paragraph 16.4 of the Protocol.<sup>306</sup> Specifically, section 2451(c)(1) of the statute provides that the ITC may find that:

Market disruption exists whenever imports of an article like or directly competitive with an article produced by a domestic industry are increasing rapidly, either absolutely or relatively, so as to be a significant cause of material injury, or threat of material injury, to the domestic industry.”<sup>307</sup>

Again, the language of section 2451(c)(1) is identical in all pertinent respects to the definition of “market disruption” used in paragraph 16.4 of the Protocol.<sup>308</sup>

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<sup>303</sup> Hot-Rolled Panel Report, para. 7.193.

<sup>304</sup> 19 U.S.C. §2451(a). Exhibit US-3.

<sup>305</sup> There are only two inconsequential variations in language between the language of section 2451(a) and paragraph 16.1. First, section 2451(a) substitutes the words “United States” for the words “territory of any of WTO Member” as used in the Protocol. *Compare* 19 U.S.C. §2451(a) *with* Protocol of Accession, Article I.16(1). Obviously, this reflects a change in language that is necessary to reflect the fact that the United States is the importing Member for purposes of its own findings in a China transition investigation. Second, the statute substitutes the phrase “a like or directly competitive product” for the phrase “like or directly competitive products” as used in the Protocol, but this change obviously has no impact on the meaning of the provision. *Id.* China has not alleged that either minor change has an impact on the consistency of the statute with the Protocol.

<sup>306</sup> *Compare* 19 U.S.C. §2451(c)(1) *with* Protocol of Accession, paragraph 16.4.

<sup>307</sup> 19 U.S.C. §2451(c)(1).

<sup>308</sup> Once again, there are only two inconsequential variations in language between the language of section 2451(c)(1) and paragraph 16.4. First, section 2451(a) substitutes the word “exists” for the words “shall exist,” as used in the Protocol, and further substitutes the word “a” for the word “the” when used in the phrase “the domestic industry” in the Protocol. *Compare* 19 U.S.C. §2451(c)(1) *with* Protocol of Accession, paragraph 16.1. Again, these changes do not affect the meaning of the Protocol, nor does China allege that they do so.

163. Further, section 2451(c)(2) of the U.S. statute requires the ITC to consider the very same factors that are specified in paragraph 16.4 of the Protocol when performing its “market disruption” analysis, and uses essentially the same language to do so.<sup>309</sup> Specifically, the U.S. statute directs the ITC to consider, when making a market disruption determination:

objective factors, including . . . the volume of imports of the product which is the subject of the investigation; . . . the effect of imports of such product on prices in the United States for like or directly competitive articles; . . . and . . . the effect of imports of such product on the domestic industry producing like or directly competitive articles . . . .<sup>310</sup>

Once again, the language of this section of the statute is, in all pertinent respects, essentially the same as that contained in the corresponding section of the Protocol, thus leaving no doubt that the analytical requirements of paragraph 16.4 of the Protocol apply to the ITC’s analysis under the U.S. statute.<sup>311</sup>

164. There is, in fact, only one textual difference between the causation language of the U.S. statute and the causation language of these paragraphs of the Protocol – the U.S. statute also contains a definition of the term “significant cause.”<sup>312</sup> Specifically, the U.S. statute provides that the “term ‘significant cause’ means a ‘cause which contributes significantly to the material injury of the domestic industry.’” The statute adds that such a cause “need not be equal to or greater than any other cause” of material injury.<sup>313</sup>

165. In its determinations under section 2451, the ITC has explained that:

Under the standard, the imports subject to investigation need not be the leading or most important cause of injury or more important than (or even equal to) any other cause, so long as a direct and significant causal link exists. Thus, if the ITC finds that there are several causes of the material injury, it should seek to determine whether the imports subject to investigation are a significant contributing cause of the injury or are such a

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<sup>309</sup> Compare 19 U.S.C. §2451(c)(2) with Protocol of Accession, paragraph 16.4.

<sup>310</sup> 19 U.S.C. §2451(d).

<sup>311</sup> Compare 19 U.S.C. §2451(d) with paragraph 16.4 of the Protocol of Accession (providing that, “[i]n determining if market disruption exists, the affected WTO Member shall consider objective factors, including the volume of imports, the effect of imports on prices for like or directly competitive articles, and the effect of such imports on the domestic industry producing like or directly competitive products”).

<sup>312</sup> 19 U.S.C. §2451(c)(2).

<sup>313</sup> 19 U.S.C. §2451(c)(2).

subordinate, subsidiary or unimportant cause as to eliminate a direct and significant causal relationship. . . .<sup>314</sup>

As can be seen, the ITC interprets the statute’s “contributing cause” language to require a finding of a “direct and significant causal link” between the rapidly increasing imports and the material injury or threat of material injury suffered by the industry. This requirement is, of course, fully consistent with the Protocol’s requirement that the competent authority establish that imports from China are “a significant cause” of material injury or threat to an industry.<sup>315</sup>

166. Furthermore, the ITC has consistently made clear that the statute does not permit it to find imports from China to be a “significant cause” of material injury or threat if they represent an “unimportant” or “minor” cause of injury, as China claims in its submission.<sup>316</sup> In its determinations, the ITC has consistently and expressly rejected this notion.<sup>317</sup> As the ITC stated in the determination at issue in this dispute, it may not find that imports from China are a “significant cause” of material injury if they are such an “unimportant,” “subordinate” or “subsidiary” cause of injury that they do not have a “direct and significant causal link” to the industry’s injury.<sup>318</sup> As can be seen, the ITC interprets the statute as requiring it to establish that there is a “direct and significant causal link” between increasing imports from China and material injury or threat in order to make a finding of market disruption under the statute.<sup>319</sup>

167. In sum, there is no explicit or implicit inconsistency between the U.S. statute and the requirements of the Protocol, as China claims. The causation provisions of the U.S. statute track, on a nearly verbatim basis, all of the causation standards contained in paragraphs 16.1 and 16.4. Moreover, although the U.S. statute contains a definition of “significant cause” that is not contained in the Protocol, that definition, as interpreted by the ITC, is consistent with the express

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<sup>314</sup> ITC Report, p. 18. Exhibit US-1. See also *Pedestal Actuators from China*, Inv. No. TA-421-1, USITC Pub. 3557 (Nov. 2002) at p. 18, Exhibit US-15; *Certain Ductile Iron Waterworks Fittings from China*, Inv. No. TA-421-4, USITC Pub. 3657 (Dec. 2003) at pp. 15-16. Exhibit US-16.

<sup>315</sup> ITC Report, p. 18 Exhibit US-1. In this regard, we note that the Working Party Report expressly equates the phrase “cause” as used in paragraph 16.4 with the term “causal link.” Working Party Report, para. 246(c) (in “determining whether market disruption existed, including the causal link between imports which were increasing rapidly, either absolutely or relatively, and any material injury or threat of material injury to the domestic industry . . . .”)

<sup>316</sup> China’s First Submission, paras. 171, 203 (the U.S. statute means that the imports from China “need only be slightly more than trivial, or not completely insignificant”), and 206 (the statutory definition allows “imports to be a less important factor than any other single cause, no matter how minor that other cause might be”).

<sup>317</sup> ITC Report, p. 18. Exhibit US-1. See also *Circular Welded Non-alloy Steel Pipe From China*, USITC Inv. No. TA-421-6, USITC Pub. 3807 (Oct. 2005), at p. 21, Exhibit US-8; *Certain Ductile Iron Waterworks Fittings From China*, USITC Inv. No. TA-421-4, USITC Pub. 3657 (Dec. 2003), p. 18. Exhibit US-16.

<sup>318</sup> ITC Report, p. 18. Exhibit US-1.

<sup>319</sup> ITC Report, p. 18. Exhibit US-1. See also *Circular Welded Non-alloy Steel Pipe From China*, USITC Inv. No. TA-421-6, USITC Pub. 3807 (Oct. 2005), at p. 21, Exhibit US-8; *Certain Ductile Iron Waterworks Fittings From China*, USITC Inv. No. TA-421-4, USITC Pub. 3657 (Dec. 2003), p. 18. Exhibit US-16..

language of the Protocol and the Appellate Body’s own analysis of the terms “cause” and “causal link” in other contexts.<sup>320</sup>

168. In other words, there is nothing in the U.S. statute that “mandates action that is inconsistent with the United States’ obligations” under the Protocol.<sup>321</sup> In fact, given the similarity in language between the operative provisions of the U.S. statute and those of the Protocol, it is clear that the statute is fully consistent with the causation requirements of the Protocol. As we discuss in more detail below, China’s claims to the contrary have no merit and should be rejected by the Panel.

**iii. China has No Basis for Its Claim that the U.S. Statute Is Inconsistent, As Such, With Paragraphs 16.1 and 16.4 of the Protocol**

169. As the United States has explained, the U.S. statute is fully consistent with paragraphs 16.1 and 16.4 of the Protocol. China tries to obscure this conclusion by exaggerating the strictness of the standard set out in the Protocol and minimizing the requirements of the U.S. statute. However, a proper reading of both reveals the fallacy of China’s arguments.

170. China asserts that the U.S. statute “improperly equates the word ‘cause’ with ‘contribute,’”<sup>322</sup> which supposedly “weakens and downgrades” the meaning of the term “significant cause” contained in paragraph 16.4 of the Protocol.<sup>323</sup> Relying on definitions contained in the New Shorter Oxford English Dictionary, China argues that the ordinary meaning of “contribute” requires only that a causal factor “play a significant part in the bringing about an end or result,” but that the word “cause” requires that a factor “produce[] an effect or consequence” or be “something that brings about an effect or result.”<sup>324</sup> China asserts that the word “contribute” requires a weaker causal connection than the word cause.

171. China’s argument is flawed in several respects. First, even the definitions proffered by China do not support its claim that there is a clear and significant distinction between the terms “cause” and “contribute.” As can be seen from the definitions offered by China, the words “cause” and “contribute” are both defined to include any causal factor that “brings about” an “effect” or result.” There is, in other words, nothing in the statutory definition of “significant cause” in terms of a cause that “contributed significantly” to support China’s claim that the U.S. statute applies a lesser “causal” standard than required under paragraph 16.4.

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<sup>320</sup> *US – Wheat Gluten (AB)*, para. 67; *US – Lamb Meat (AB)*, para. 166.

<sup>321</sup> Hot-Rolled Panel Report, para. 7.193.

<sup>322</sup> China First Submission, para. 197.

<sup>323</sup> China First Submission, paras. 197-203.

<sup>324</sup> China First Submission, para. 198.

172. China’s argument also ignores that the Appellate Body, in the context of the Safeguards Agreement, has itself defined the terms “cause” and “causal link” in terms of a cause that “contributes to” the injury being suffered by an industry. In *US – Wheat Gluten*, the Appellate Body examined the “causal link” requirement contained in Article 4.2(b) of the Safeguards Agreement and explained:

The word “causal” means “relating to a cause or causes,” while the word “cause,” in turn, denotes a relationship between, at least, two elements, whereby the first element has, in some way, “brought about,” “produced,” or “induced” the existence of the second element. The word “link” indicates simply that increased imports have played a part in, or contributed to, bringing about serious injury so that there is a causal “connection” or “nexus” between these two elements. Taking these words together, the term “causal link” denotes, in our view, a relationship of cause and effect such that increased imports contribute to “bringing about, “producing,” or “inducing” the serious injury.<sup>325</sup>

China concedes,<sup>326</sup> and the Working Party Report establishes,<sup>327</sup> that the terms “cause” and “causal link” are effectively the same for the purposes of the analysis set forth in the Protocol. Therefore, contrary to China’s argument, the Appellate Body’s reasoning would appear to establish that an inquiry into whether increased imports “contribute” to “bringing about” or “producing” the requisite level of injury is a permissible means to establish that those imports “cause” the injury.

173. China’s interpretation of the meaning of “significant cause” is also flawed because it ignores the actual language of the Protocol. As noted above, paragraph 16.4 of the Protocol does not state that rapidly increasing imports from China must be the sole or primary cause of material injury to the industry. Instead, paragraph 16.4 provides that “market disruption shall exist” if imports from China constitute “a significant cause of material injury, or threat of material injury” to a domestic industry.<sup>328</sup> By stating that imports from China can be “a significant cause” of material injury or threat to an industry, the text of the Protocol establishes that there may be multiple significant causes of material injury or threat to an industry. Given this, it follows from the text of the Protocol that imports from China can be one of several “significant causes” contributing to the material injury or threat of injury suffered by an industry.<sup>329</sup>

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<sup>325</sup> *US - Wheat Gluten (AB)*, para. 67.

<sup>326</sup> China First Submission, para. 180 (“the term ‘cause’ in the text of Article 16 of the Protocol and the phrase ‘causal link’ as used in the discussion of Article 6 of the Working Party Report are used synonymously”).

<sup>327</sup> Working Party Report, para. 246(c)(when “determining whether market disruption existed, including the causal link between imports which were increasing rapidly, ... and any material injury or threat of material injury....”).

<sup>328</sup> Protocol of Accession, paragraph 16.4.

<sup>329</sup> Protocol of Accession, paragraph 16; *see also US – Wheat Gluten (AB)*, para. 67; *US - Lamb Meat (AB)*, para. 166.

174. Furthermore, China also errs in alleging that the U.S. statute allows the ITC to find that imports from China to be a “significant cause,” even if they are “less important than any other single cause, no matter how minor that other cause might be.”<sup>330</sup> The ITC has explicitly rejected such a notion. As the ITC stated in its determination here, it may not find that imports from China are a “significant cause” of material injury if those imports are such an “unimportant,” subordinate,” or “subsidiary” cause of injury that there is no “direct and significant causal link” between the imports and material injury or threat.<sup>331</sup> Instead, as the ITC has consistently stated, the ITC must find a “direct and significant causal link” between imports from China and material injury or threat,<sup>332</sup> which constitutes an interpretation of the statute that is fully consistent with the requirements of paragraph 16.4 of the Protocol.

175. The definition of “significant cause” in the U.S. statute and the ITC’s application of the term is consistent with how panels have analyzed the term “significant” in the context of Articles 6.3(c) and 15.2 of the *Agreement on Subsidies and Countervailing Measures*. In *EC – DRAMS*, after noting the dictionary definitions of “significant”, the panel stated that it “all suggest[s] something that is more than just a nominal or marginal movement.”<sup>333</sup> In *Korea – Commercial Vessels*, again after noting the dictionary definitions of “significant”, the panel stated: “Put another way, a price suppression or price depression that is unimportant or inconsequential would not be ‘significant’ in the sense of Article 6.3(c).”<sup>334</sup> That panel goes on to cite the panel in *Indonesia – Autos* for the proposition that the term “significant” is a “*de minimis* concept intended to screen out very small, unimportant price effects.”<sup>335</sup>

176. China seeks to buttress its argument by asserting that the Protocol imposes a “more demanding” causal link standard on a competent authority than does the Safeguards Agreement.<sup>336</sup> To support this claim, China points out that, under the Protocol, increasing imports from China must be a “significant” cause of material injury or threat to the domestic industry, while the Safeguards Agreement requires only that imports “cause” serious or material injury to a domestic industry.<sup>337</sup>

177. China’s arguments are meritless. First, under Article 31 of the Vienna Convention, terms like “significant cause” and “cause” are not interpreted in isolation, but in their context and in light of the object and purpose of the relevant agreement. It is true that the word “significant” does not modify “cause” in the Safeguards Agreement. However, when analyzing the causation

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<sup>330</sup> China’s First Submission, paras. 204-205.

<sup>331</sup> ITC Report, p. 18.

<sup>332</sup> E.g., ITC Determination at p. 18 Exhibit US-1.

<sup>333</sup> *EC – DRAMS*, para. 7.307.

<sup>334</sup> *Korea – Commercial Vessels*, para. 7.570

<sup>335</sup> Id, para. 7.571.

<sup>336</sup> China First Submission, paras. 170, 186-190.

<sup>337</sup> China First Submission, paras. 179-187.

requirement under the Safeguards Agreement, the Appellate Body has considered the interlocking requirements of Article 2.1, 4.1, and 4.2 and concluded that they collectively required an analysis that “determine[s], as a final step . . . whether this causal link involves a genuine and substantial relationship of cause and effect” between increased imports and the requisite level of injury.<sup>338</sup>

178. Paragraph 16 of the Protocol is structured differently than the more complex Safeguards Agreement. Paragraph 16.1 refers simply to increasing imports from China that “cause or threaten to cause market disruption.” Paragraph 16.4 and paragraph 246(c) of the Working Party Report lay out the factors to consider when determining “the causal link between imports . . . and any injury or threat of material injury.”<sup>339</sup> The word “significant” appears only in the first sentence of paragraph 16.4, which defines “market disruption” as existing when those imports are “a significant cause of material injury, or threat of material injury.” The meaning of significant is “[i]mportant, notable; consequential.”<sup>340</sup>

179. Thus, China is wrong to argue that by modifying “cause” with “significant,” the Protocol simply took the causation standard of the Safeguards Agreement and made it more “severe.” Under the Vienna Convention, each term must be interpreted in the context of its particular agreement. That analysis demonstrates two different requirements: a “genuine and substantial relationship of cause and effect” under the Safeguards Agreement and an “important, notable, or consequential” cause under paragraph 16 of the Protocol. China’s effort to argue that one is more “severe” than the other is a pointless exercise, as it provides no guidance as to the meaning of either, or as to whether the causation standard under section 2451 is consistent with paragraph 16 of the Protocol.

180. China also seeks to buttress its argument by re-defining the term “market disruption.”<sup>341</sup> Relying on definitions of the words “market” and “disruption” contained in *New Shorter Oxford English Dictionary*, China claims that a competent authority must be able to establish under the Protocol that increasing imports from China have had an impact of “major magnitude” on the market, causing it to “burst or shatter and be left disorganized.”<sup>342</sup>

181. The problem with China’s argument is obvious. There is no need for the Panel to consult a dictionary to define the term “market disruption” because the Protocol itself defines the term. In particular, paragraph 16.4 states:

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<sup>338</sup> *E.g.*, *US- Wheat Gluten (AB)*, para. 69.

<sup>339</sup> Working Party Report, para. 246(c).

<sup>340</sup> *New Shorter Oxford English Dictionary*, p. 2860.

<sup>341</sup> China First Submission, paras. 188-190.

<sup>342</sup> China First Submission, para. 190.



Market disruption shall exist whenever imports of an article, like or directly competitive with an article produced by the domestic industry, are increasing rapidly, either absolutely or relatively, so as to be a significant cause of material injury, or threat of material injury to the domestic industry.<sup>343</sup>

Article 31.4 of the Vienna Convention provides that “[a] special meaning shall be given to a term if it is established that the parties so intended.” In accordance with that principle, the Protocol’s explicit definition of the term makes recourse to other sources unnecessary. Instead, the Panel need only concern itself with the issue of whether the ITC has properly determined the existence of market disruption in the sense of the Protocol, namely whether rapidly increasing imports of tires from China were a significant cause of material injury or threat to the domestic tires industry. The United States had no obligation to meet another standard.

182. Finally, China mistakenly claims that a more “demanding” standard for causation should be applied to a competent authority’s decision under paragraph 16 of the Protocol because the transitional mechanism authorized in paragraph 16 is an “exceptional, country-specific measure designed to address unforeseen surges in imports from China.”<sup>344</sup> According to China, the transitional mechanism of the Protocol may only be used as an “escape valve” in “emergency situations as an extraordinary remedy” against rapidly increasing imports from China.<sup>345</sup> However, as the United States discussed above, China is mistaken in claiming that the transitional remedy under paragraph 16 was intended to be used only in exceptional circumstances involving unforeseen surges in Chinese imports.

183. China’s theory is based on the mistaken assumption that the basic principles that are applicable to an action taken under the Safeguards Agreement are also applicable to the transitional mechanism specified in the Protocol. As the United States also discussed above, there is no basis for China’s assertion that this Panel should engraft the standards that are applicable to a global safeguards measure onto this Panel’s assessment of whether the ITC’s “market disruption” finding complies with the Protocol. In this regard, we would point out that, unlike the provisions of Article XIX of the GATT 1994 and the provisions of the Safeguards Agreement, nothing in the Protocol indicates that the Protocol’s transitional measure was intended to be an “emergency action”<sup>346</sup> or that the rapid increase in imports from China must be the result of “unforeseen developments.”<sup>347</sup> In fact, it was the inclusion of these specific terms in Article XIX of the GATT 1994 and the Safeguards Agreement that led to the Appellate Body’s conclusion that, under the Safeguards Agreement and GATT 1994, a global safeguard measure

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<sup>343</sup> Protocol of Accession, para. 16.4.

<sup>344</sup> China First Submission, paras. 191-193.

<sup>345</sup> China First Submission, paras. 191-193.

<sup>346</sup> GATT 1994, Article XIX:1(a); Safeguards Agreement, Article 11.1(a).

<sup>347</sup> GATT 1994, Article XIX:1(a).

was to be used only as an “extraordinary remedy.”<sup>348</sup> Because similar terms and language were not included in paragraph 16 of the Protocol, it is inappropriate to conclude, as China does, that the Appellate Body’s statements about the “extraordinary” nature of a global safeguard apply to the transitional mechanism set forth in the Protocol.

184. Moreover, China’s argument that the Protocol requires a stricter causation standard than the Safeguards Agreement ignores another critical difference between the Agreement and the Protocol. Unlike the Safeguards Agreement, which specifies that increased imports must cause or threaten to cause “serious injury” to the industry, the transitional mechanism in the Protocol requires only that imports from China be a significant cause of “material injury or threat of material injury” to the industry. Since that Appellate Body has already explained a finding of “material injury” under the Antidumping and Subsidies Agreements requires a less significant showing than a finding of serious injury under the Safeguards Agreement,<sup>349</sup> the Protocol’s requirement that the rapidly increasing imports be a cause of “material injury” to the industry – rather than a cause of “serious injury” to the industry – further indicates that the transitional measure was not intended to be subject to the same exacting standards that are applicable to a global safeguards measure.

185. In other words, there is no basis for China’s claim that the causation standard was intended to be more demanding or stricter than that contained in the Safeguards Agreement. On the contrary, a reasoned analysis of the distinctions between the Protocol and the Safeguards Agreement indicates that the causal link standard required in the Protocol was intended to be less rigorous standard than that set forth in the Safeguards Agreement

## **b. Conclusion**

186. The causation requirements of the U.S. statute are fully consistent with the causation requirements of the Protocol. The U.S. statute incorporates, on an almost verbatim basis, the precise causation language contained in paragraphs 16.1 and 16.4 of the Protocol, thus making clear that the ITC has the ability to conduct an analysis in a manner that is consistent with the requirements of the Protocol. Moreover, there is nothing in the language of the statute that indicates, explicitly or otherwise, that the U.S. statute’s definition of “significant cause” somehow weakens or reduces the causal link required under the Protocol. On the contrary, the U.S. definition of “significant cause” is consistent both with the explicit language of the Protocol and with the Appellate Body’s own statements about the meaning of the terms “cause” and “causal link.” In other words, China simply cannot establish, as it must, that the U.S. statute mandates that the ITC take action that is inconsistent with its obligations under paragraph 16 of the Protocol.

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<sup>348</sup> *Argentina – Footwear*, paras. 93-95; *US - Line Pipe*, para. 81.

<sup>349</sup> *US - Lamb Meat (AB)*, para. 124.

## **2. The ITC’s Causation Analysis, As Applied, Was in Accordance with the Requirements of the Protocol**

187. The ITC’s causation analysis, as applied, was also fully in accordance with paragraphs 16.1 and 16.4 of the Protocol. For the product at issue, the ITC objectively analyzed the record evidence in detail and then established unambiguously that rapidly increasing imports from China were a significant cause of material injury to the domestic industry. The arguments made to the contrary by China disregard the pertinent obligations under the plain text of the Protocol.

188. Throughout its submission, China improperly attempts to create standards and impose obligations on the United States that are not found in the Protocol. Moreover, China has disregarded the numerous and detailed factual findings by the ITC establishing that rapidly increasing imports from China were a significant cause of material injury to the domestic industry. Instead of addressing the ITC’s analysis as a whole, China opts to present selected portions of the ITC’s determination in isolation and attempts to rebut each one on its own by suggesting alternative interpretations of the data.

189. The ITC, however, properly rejected such a piecemeal approach to causation. In accordance with the text of the Protocol, the ITC focused instead on the entirety of the evidence, relating to the volume of the imports, the effect of imports on prices for the domestic like product, and the effect of such imports on the domestic industry. After doing so, the ITC established that imports from China were a significant cause of material injury to the domestic industry.

190. Accordingly, China’s arguments related to causation are without merit and should be rejected by the Panel. We discuss these issues in detail below.

### **a. Paragraphs 16.1 and 16.4 of the Protocol**

191. Paragraphs 16.1 and 16.4 of the Protocol set forth the requirements applicable to the ITC’s analysis concerning whether the subject imports were a significant cause of material injury, or threat of material injury to the domestic industry. Paragraph 16.1 provides that as a condition for imposing a measure, the imposing country is required to show that:

. . . products of Chinese origin are being imported into the territory of any WTO Member in such increased quantities or under such conditions as to cause market disruption to the domestic producers of like or directly competitive products . . . .<sup>350</sup>

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<sup>350</sup> Protocol of Accession, para. 16.1.

192. Paragraph 16.4 of the Protocol describes in more detail the analytical parameters that apply to a competent authority’s causation analysis in this type of proceeding. Paragraph 16.4 states that:

Market disruption shall exist whenever imports of an article, like or directly competitive with an article produced by the domestic industry, are increasing rapidly, either absolutely or relatively, so as to be a significant cause of material injury, or threat of material injury to the domestic industry. In determining if market disruption exists, the affected WTO Member shall consider objective factors, including the volume of imports, the effect of imports on prices for like or directly competitive articles, and the effect of such imports on the domestic industry producing like or directly competitive products.<sup>351</sup>

193. The Protocol contains no other specific requirements relating to the analysis required of a competent authority when assessing whether “market disruption” exists.<sup>352</sup> The Protocol does not direct or require a competent authority to apply any particular methodology when it assesses whether the subject imports have been a significant cause of material injury or threat of material to an industry. Nor does the Protocol direct the authority to examine the volumes of imports, the effect of imports on domestic prices, or their effect on the industry in any particular manner.<sup>353</sup> Accordingly, a competent authority has discretion to develop and use an appropriate methodology that allows it to address these factors in a reasoned manner.<sup>354</sup>

194. Unlike the Safeguards Agreement, the Antidumping Agreement, and Part IV of the SCM Agreement,<sup>355</sup> paragraph 16 of the Protocol does not specifically direct a competent authority to consider the effects of other factors that may be causing material injury or threat of material injury to the industry, nor does it require the authority to ensure that it does not attribute the effects of these other factors to the subject imports.<sup>356</sup> Thus, a competent authority therefore has

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<sup>351</sup> Protocol of Accession, para. 16.4.

<sup>352</sup> See generally Protocol of Accession, paragraph 16.

<sup>353</sup> See generally Protocol of Accession, paragraph 16.

<sup>354</sup> *EC - Pipe Fittings (AB)*, para. 189 (in context of Antidumping Agreement, as long as an investigating authority complies with the specific requirements of the Agreement, “it is free to choose the methodology it will use in examining the ‘causal relationship’ between dumped imports and injury”); *US - Hot-Rolled Steel (AB)*, para. 224 (same).

<sup>355</sup> Safeguards Agreement, Article 4.2(b)(second sentence); Antidumping Agreement, Article 3.5 (third sentence); SCM Agreement, Article 15.5 (third sentence).

<sup>356</sup> See generally Protocol of Accession, paragraph 16.

the discretion to develop and use any appropriate analysis when addressing the injury caused by these factors in its analysis.<sup>357</sup>

195. Finally, in terms of the reasoning that is required of the competent authority, the Protocol only provides that the “WTO Member shall provide written notice of the decision to apply a measure, including the reasons for such measure and its scope and duration.”<sup>358</sup> The Working Party’s Report further elaborates on this issue, stating that the “competent authority would promptly publish notice of the decision to apply a measure, including an explanation of the basis for the decision and the scope and duration of the measure.”<sup>359</sup> As a result, the ITC is simply required to provide the “reasons” for its decision, and an “explanation of the basis” for it.

196. The Protocol contains no other provisions imposing any additional causation requirements on the competent authority.

#### **b. Overview of the ITC’s Causation Analysis**

197. As described in detail below, the ITC’s causation analyses was fully in accordance with the requirements set forth in paragraphs 16.1 and 16.4 of the Protocol. Consistent with paragraph 16.1 of the Protocol, the ITC examined whether tires from China were being imported “in such increased quantities or under such conditions as to cause or threaten to cause market disruption” to the domestic producers. . . .<sup>360</sup>

198. In its determination, the ITC found that several conditions of competition affected the market for tires during the period of investigation, including:

The Chinese and U.S. producers manufacture a broad range of tire sizes and styles with varying performance characteristics.<sup>361</sup>

- The subject tires and U.S. tires are generally used interchangeably in the U.S. market.<sup>362</sup>

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<sup>357</sup> *EC - Pipe Fittings (AB)*, para. 189 (in context of Antidumping Agreement, as long as an investigating authority complies with the specific requirements of the Agreement, “it is free to choose the methodology it will use in examining the ‘causal relationship’ between dumped imports and injury”); *US - Hot-Rolled Steel (AB)*, para. 229 (same).

<sup>358</sup> Protocol of Accession, para. 16.5.

<sup>359</sup> Working Party Report, para. 246(e).

<sup>360</sup> Protocol of Accession, para. 16.1.

<sup>361</sup> ITC Report, p. 21. Exhibit US-1.

<sup>362</sup> ITC Report, p. 21 *citing* ITC Report , V-15-16 (showing that at least 80 percent of responding producers, importers, and purchasers indicated that subject tires produced in the United States and imported from China are at least “frequently” interchangeable.). Exhibit US-1.

- The passenger vehicle and light truck tires market consists of two basic sectors: the original equipment manufacturers (OEM) market and the replacement market. Imports from China and U.S. tires are sold in both sectors, with the replacement market being the more important sector for both sets of producers in terms of the volume of sales.<sup>363</sup>
- Tires sold in the replacement market are often perceived to fall into three categories (or “tiers”) of tires based on brand and price. There was, however, no clear dividing lines among categories and no consensus among market participants as to how to define the categories.<sup>364</sup>
- During the period of investigation, there were significant U.S. shipments of U.S. produced tires in all three categories. U.S. shipments of the subject tires from China were also made into the three categories.<sup>365</sup>
- The demand for replacement tires and OEM tires both fell in 2008 as the economy weakened.<sup>366</sup>
- Imports of tires from China increased during each year of the period examined and the quantity of those imports was 215.5 percent higher in 2008 than in 2004.<sup>367</sup>
- In contrast to subject imports, the quantity of U.S. imports from countries other than China declined in each year since 2005, and was 5.4 percent lower in 2008 than in 2004.<sup>368</sup>

199. Taking the foregoing conditions of competition into account, and in accordance with the requirements of paragraph 16.4 of the Protocol, the ITC then conducted an objective and detailed analysis of the volume of imports, the effect of imports on prices, and the effect of such imports

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<sup>363</sup> ITC Report, p. 21. Exhibit US-1. In 2008, 82.3 percent of U.S. producers’ U.S. shipments and 95.0 percent of subject imports from China were to the replacement market.

<sup>364</sup> ITC Report, p. 21. Exhibit US-1.

<sup>365</sup> Specifically, the responses indicated that U.S. shipments of U.S. produced tires were the largest in category one, the second largest was category three, followed by category two. ITC Report, p. 21, Exhibit US-1. The responses also indicated that U.S. shipments of the subject tires from China were the largest in category three, followed by category two, and a very small share falling into category one. ITC Report, p. 21, Exhibit US-1.

<sup>366</sup> ITC Report, p. 22. Exhibit US-1.

<sup>367</sup> ITC Report, p. 22. Exhibit US-1.

<sup>368</sup> ITC Report, p. 22. Exhibit US-1.

on the domestic industry.<sup>369</sup> In accordance with the language of the Protocol, the ITC found that there was market disruption due to rapid increases in tire imports from China.<sup>370</sup>

200. Specifically, the ITC found that the significant increase in the volume of subject imports coincided with significant underselling of the domestic like product by the subject imports.<sup>371</sup> It also found that the rising volume of subject imports also coincided with the decline in the domestic industry's performance indicators as subject imports from China displaced domestic sales in the market, and this displacement led to declining domestic production, shipments, capacity utilization, employment, and profitability.<sup>372</sup> As a result, the ITC found that the subject imports were a significant cause of material injury to the domestic industry.

201. The record fully supported these findings. In terms of volume, the ITC noted that subject imports increased in each year of the period and were at their highest levels of the period in 2008.<sup>373</sup> The record also showed that subject imports increased by 215.5 percent over the period, with the greatest and most rapid increases occurring after 2006.<sup>374</sup>

202. The Commission noted that the large increase in the volume of subject imports was also reflected in the large and growing share of the U.S. market held by subject imports.<sup>375</sup> The record showed that subject imports increased their share of the U.S. market more than three-fold over the period of investigation, growing from 4.7 percent in 2004 to 16.7 percent in 2008. The record also showed that more than half of this increase has occurred since 2006.<sup>376</sup>

203. The ITC also considered the effect of subject imports on the prices of U.S.-produced tires. The ITC received quarterly pricing data for the investigation period from U.S. producers and importers of subject tires for six separate tire products. The pricing data showed nearly universal underselling by the subject merchandise. In 119 of the 120 possible price comparisons for

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<sup>369</sup> ITC Report, pp. 22-29. Exhibit US-1.

<sup>370</sup> ITC Report, p. 29. Exhibit US-1.

<sup>371</sup> ITC Report, p. 29. Exhibit US-1.

<sup>372</sup> ITC Report, p. 29. Exhibit US-1.

<sup>373</sup> ITC Report, p. 22. Exhibit US-1. The volume of subject imports increased from 14.6 million tires in 2004 to 20.8 million tires in 2005, to 27 million tires in 2006, to 41.5 million tires in 2007, and to a period high 46.0 million tires in 2008. ITC Report at Table C-1. Exhibit US-1.

<sup>374</sup> ITC Report, p. 22. Exhibit US-1.

<sup>375</sup> ITC Report, p. 22. Exhibit US-1.

<sup>376</sup> ITC Report, p. 22. Exhibit US-1. The market share held by subject imports increased from 4.7 percent in 2004 to 6.8 percent in 2005, to 9.3 percent in 2006, to 14.0 percent in 2007, and to a period high 16.7 percent in 2008. ITC Report, Table C-1. Exhibit US-1. The ITC also referenced its discussion of subject import volumes in the section of the opinion addressing rapidly increasing imports. ITC Report, pp. 11-12. In that analysis, the ITC noted that both the ratio of subject imports to U.S. production and the ratio of subject imports to apparent U.S. consumption rose throughout the period examined, and both ratios were at their highest levels of the period in 2008. ITC Report, p. 12. Exhibit US-1.

domestic tires and subject imports, the subject imported product was priced below the domestic product, with margins of underselling averaging 18.9 percent.<sup>377</sup> The average margin of underselling for all six products increased by their greatest amount in 2007, the year in which the volume of rapidly increasing imports rose by their greatest amount. In 2008, the average margin of underselling for the six products remained at nearly the same level as in 2007 and was significantly above the average for the six products in each of the years 2004-2006.<sup>378</sup>

204. As a result, the ITC found that the pricing data showed that underselling by the subject Chinese tires had been significant and continuous throughout the period examined and that the margin of underselling increased over the period.<sup>379</sup> Moreover, it also found that this pervasive underselling by the large and rapidly increasing volume of subject Chinese tires eroded the domestic industry's market share, and led to a sharp decline in virtually all of the domestic industry's performance indicators.

205. The ITC also noted that the majority of responding U.S. producers, importers and purchasers indicated that domestically produced tires and the subject imports are "always" used interchangeably.<sup>380</sup> At least 80 percent of these market participants reported that the domestically produced tires and the subject imports are at least "frequently" used interchangeably. Accordingly, as the ITC stated:

The close substitutability of the domestic product and the subject imports combined with pervasive underselling by significant and growing margins enhanced the ability of subject imports to displace domestically produced tires in the U.S. market.<sup>381</sup>

206. The ITC also found that continued underselling by the subject imports prevented domestic producers from raising prices sufficiently to offset higher production costs and thus suppressed prices.<sup>382</sup> The domestic producers' ratio of cost of goods sold to net sales increased from 84.7 percent in 2004 to 90.1 percent in 2008, an increase of 5.4 percentage points over the period.<sup>383</sup> The ITC found that the "sharp increase in this ratio in 2008, when the volume of subject imports was highest and the margin of underselling was nearly at its greatest, indicate[d]

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<sup>377</sup> ITC Report, Table V-17. Exhibit US-1. As previously noted, the ITC uses the term "underselling" to refer to price "undercutting."

<sup>378</sup> ITC Report, p. 23. Exhibit US-1. The average margin of underselling was 23.6 percent in 2008 as compared to 25.4 percent in 2007.

<sup>379</sup> ITC Report, p. 22. Exhibit US-1

<sup>380</sup> ITC Report, p. 23. Exhibit US-1.

<sup>381</sup> ITC Report, p. 23. Exhibit US-1.

<sup>382</sup> ITC Report, p. 24. Exhibit US-1.

<sup>383</sup> ITC Report, Table C-1. Exhibit US-1.



that U.S. producers were experiencing a cost-price squeeze and unable to pass increasing raw material costs on to their customers.<sup>384</sup>

207. Finally, the ITC examined the effect that the rapidly increasing volumes of undersold subject imports had on the domestic industry. The ITC noted that almost all of the industry’s performance and financial indicators deteriorated during the period. Specifically, the record showed:

- A decline in the domestic producers’ market share in every year of the period resulting in an overall decline in market share of 13.7 percentage points.<sup>385</sup>
- A continuous decline in the U.S. industry’s net sales volume throughout the period, which were also reflected in declining production and shipments.<sup>386</sup>
- A significant decline in the industry’s capacity, which fell by 17.8 percent over the period examined.<sup>387</sup>
- A significant decline in the industry’s employment-related factors in every year of the period, including production workers, hours worked, and wages paid.<sup>388</sup>
- A worsening of the domestic producers’ ratio of cost of goods sold to net sales volume, from 84.7 percent in 2004 to 90.1 percent in 2008,<sup>389</sup> indicating that by 2008, U.S. producers were experiencing a cost-price squeeze and unable to pass increasing raw material costs on to their customers.
- The domestic industry’s operating income fell throughout the period, and the industry had its worst one-year performance of the period in 2008.<sup>390</sup>

208. The ITC then explained why it found that “there [was] a direct and significant connection between the rapidly increasing imports of subject tires from China and the domestic industry’s

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<sup>384</sup> ITC Report, p. 24. Exhibit US-1. Three domestic producers reported that they either had to reduce prices or roll back announced price increases to avoid losing sales to competitors selling subject tires from China. ITC Report, p. V-36. Exhibit US-1.

<sup>385</sup> ITC Report, p. 25. Exhibit US-1.

<sup>386</sup> ITC Report, pp. 23-24. Exhibit US-1.

<sup>387</sup> ITC Report, p. 24 and Table C-1. Exhibit US-1.

<sup>388</sup> ITC Report, p. 17. Exhibit US-1.

<sup>389</sup> ITC Report, p. 24. Exhibit US-1.

<sup>390</sup> ITC Report, p. 23. Exhibit US-1.

deteriorating financial performance and declining capacity, production, shipments, and employment.”<sup>391</sup>

209. For example, the ITC noted that subject import market share by quantity increased by 12.0 percentage points during the period examined, while the domestic industry’s market share declined by 13.7 percentage points – thus reflecting an almost a one-to-one direct displacement by subject imports of domestic production.<sup>392</sup> The ITC explained that, as imports of low-priced Chinese tires obtained a more significant share of the U.S. tire market over the period, U.S. producers were forced to reduce capacity in the lower-priced segment of the market which was where significant amounts of subject tires were sold. Accordingly, the ITC found that:

the substantial reduction in domestic capacity and the closures of U.S. plants during the period examined were largely in reaction to the significant and increasing volume of subject imports from China, and were not, as respondents argue, part of a strategy by domestic tire producers to voluntarily abandon the low-priced, ‘value’ segment of the U.S. market.<sup>393</sup>

210. The ITC also specifically considered and rejected respondents’ argument that competition in the U.S. market was so attenuated that subject imports could not possibly be a significant cause of material injury to the domestic industry.<sup>394</sup> Based on information gathered on this issue through supplemental questionnaires, the ITC found that respondents’ claim that subject imports did not compete in the Tier 1 and Tier 2 segments of the replacement market or the OEM market was not supported by the record.<sup>395</sup>

211. Although the ITC found that the U.S. replacement market can generally be segmented into three categories, it also found that the market participants did not agree on what tires should be included in the two lower-priced categories.<sup>396</sup> Confirming this lack of a bright-line dividing line between the three tiers, market participants provided a wide range of estimates of the share of U.S. producers and subject Chinese tire shipments that fall into each category.<sup>397</sup>

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<sup>391</sup> ITC Report, pp. 24-29. Exhibit US-1. China does not challenge the ITC’s finding of material injury. China First Submission, para. 185 n.185.

<sup>392</sup> ITC Report, p. 24. Exhibit US-1.

<sup>393</sup> ITC Report, pp. 24-29. Exhibit US-1.

<sup>394</sup> ITC Report, pp. 26-27. Exhibit US-1.

<sup>395</sup> ITC Report, p. 27. Exhibit US-1.

<sup>396</sup> ITC Report, p. 27. Exhibit US-1.

<sup>397</sup> ITC Report, p. 27. Exhibit US-1.

212. Moreover, the ITC found that shipments in 2008 of both domestically produced tires and subject imports from China, were sold in all three categories.<sup>398</sup> For example, U.S. producers' U.S. shipments of category three tires accounted for approximately 18.6 percent of their total U.S. shipments.<sup>399</sup> There were also significant shipments of subject tires from China that fell into category two, equaling approximately 64.3 percent of the quantity of China's shipment's in category three. In addition, the ITC found that there was competition in the OEM market, with subject imports accounting for 4.9 percent of that market in 2008 and domestically produced tires accounting for 51.6 percent in 2008.

213. Accordingly, based on this record evidence, the ITC concluded:

U.S.-produced tires and subject imports from China both have a significant presence in the Tier 2 and Tier 3 . . . segments of the replacement market, both are also present in the Tier 1 segment . . . and the OEM market, and there is significant competition between the subject imports and domestic tires in the U.S. market.<sup>400</sup>

**c. China's Challenges to the ITC's Determination are Unfounded**

214. In challenging the ITC's causation analysis, China makes three main arguments. First, China argues that the ITC failed to show that the conditions of competition in the U.S. market support the finding of causation.<sup>401</sup> Second, China argues that the ITC failed to establish a correlation between rapidly increasing imports and material injury to the domestic industry.<sup>402</sup> Finally, China asserts that the ITC ignored or failed to assess fully other causes of injury.<sup>403</sup>

215. All of China's arguments are flawed. They either mischaracterize or disregard the findings in the ITC determination, misinterpret the requirements of the Protocol, fail to recognize the very different standards and requirements of the Safeguards Agreement and the Protocol, or misconstrue prior findings and recommendations of Panels or the Appellate Body in the Safeguards Agreement context. Accordingly, the Panel should reject China's arguments.

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<sup>398</sup> ITC Report, p. 27. Exhibit US-1.

<sup>399</sup> ITC Report, p. 27. Exhibit US-1.

<sup>400</sup> ITC Report, p. 27. Exhibit US-1.

<sup>401</sup> China First Submission, paras. 211-238.

<sup>402</sup> China First Submission, paras. 239-321.

<sup>403</sup> China First Submission, paras. 326-358.

**i. The ITC Conducted a Detailed Conditions of  
Competition Analysis**

216. At the outset, we note that China attempts to apply standards developed under the Safeguards Agreement to a conditions of competition analysis. Citing various panel decisions interpreting an investigating authority’s obligations under the Safeguards Agreement, China alleges that the ITC’s conditions of competition analysis needed to be “particularly thorough and exacting” and that the ITC’s use of industry-wide statistics was insufficient for purposes of assessing the conditions of competition.<sup>404</sup> In making these claims, China reveals its fundamental misunderstanding of the differing requirements of the Protocol and the Safeguards Agreement.

217. Article 2.1 of the Safeguards Agreement provides that a member may impose a global safeguard only if it has determined that a product “is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry.” (Emphasis added). By way of comparison, the language of paragraph 16.1 of the Protocol states that a need for a transitional measure may arise in cases where products from China are being imported “in such increased quantities or under such conditions as to cause or threaten to cause market disruption.”<sup>405</sup> (Emphasis added). Thus, unlike the language of the Safeguards Agreement which specifically requires an analysis of increased quantities *and* the conditions under which imports are causing serious injury, the Protocol indicates that increased quantities alone or conditions alone may cause market disruption. Furthermore, the Protocol’s definition of market disruption in paragraph 16.4 does *not* require the investigating authority to examine conditions of competition to determine if market disruption exists, but directs it only to consider import volumes, their price effects, and the effect of imports on the domestic industry. Accordingly, China’s arguments that WTO reports in the Safeguards Agreement context identifies requirements that are also applicable to the ITC’s determination is misplaced.

218. Nonetheless, the ITC did in fact conduct a detailed conditions of competition analysis in this proceeding, and thereby more than satisfied the requirements set out in the Protocol. China argues that the ITC misinterpreted and distorted conditions of competition in the domestic tire market, and that this failure undermined the ITC’s causation analysis.<sup>406</sup> It asserts that factors other than increasing imports – including declining demand, the industry’s business strategy, and attenuated competition among the different market segments – were a “significant cause” of market disruption to the U.S. industry. None of these arguments have merit.

219. The United States will address each of these claims in turn.

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<sup>404</sup> China First Submission, paras. 211-217.

<sup>405</sup> Protocol of Accession, para. 16.1. (Emphasis added)

<sup>406</sup> China First Submission, para. 211.

**(a) The ITC Reasonably Analyzed Declining Demand**

220. China first contends that the ITC did not acknowledge declining demand for tires, particularly in 2008. China is mistaken. In fact, the ITC specifically acknowledged that demand for replacement tires and for OEM tires was falling throughout the period,<sup>407</sup> and fell in 2008 as the economy weakened.<sup>408</sup> The ITC then noted, however, that subject imports continued to increase rapidly in 2008, even though U.S. apparent consumption was falling.<sup>409</sup>

221. In particular, subject imports increased by 4.5 million tires in 2008, a 10.8 percent increase from 2007, to their highest level over the period examined, despite the fact that U.S. consumption fell by 6.9 percent from 2007 to 2008.<sup>410</sup> By way of comparison, the ITC noted that non-subject imports declined in 2008 by 6.1 percent, roughly equivalent to the decline in apparent consumption. Domestic production declined by 20.0 million tires in 2008, or by 11.1 percent, and absorbed virtually all the decline in U.S. apparent consumption that year.

222. Thus, despite the fact that apparent U.S. consumption fell in 2008, due in part to the economic recession, shipments of low-priced subject imports not only remained strong but continued to grow during the market contraction. The fact that low-priced subject imports were able to increase both absolutely and relatively in the face of a contracting market in 2008 even as the quantities of domestically produced tires and non-subject imports both declined contradicts China's argument that any injury to the domestic industry was caused by declines in demand due to the recession. The ITC analyzed demand declines, and found that they did not explain the industry's deteriorating condition over the period.

**(b) The ITC Reasonably Addressed Industry Business Strategy in its Analysis**

223. China also mistakenly contends that the ITC failed to consider the alleged industry business strategy that shifted production in the United States towards the higher-end segments of the market and away from lower-end tires.<sup>411</sup> In fact, the ITC directly addressed this issue in its analysis. It found that, as imports of low-priced Chinese tires increased, U.S. producers were forced to reduce capacity so as to focus on the parts of the business in which they could expect to remain profitable despite the impact of low-priced subject imports.<sup>412</sup>

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<sup>407</sup> ITC Report, p. 32. Exhibit US-1.

<sup>408</sup> ITC Report, p. 22. Exhibit US-1.

<sup>409</sup> ITC Report, p. 26. Exhibit US-1.

<sup>410</sup> ITC Report, p. 26 and Table C-1. Exhibit US-1.

<sup>411</sup> China First Submission, para. 220.

<sup>412</sup> ITC Report, pp. 24-25. Exhibit US-1.

224. Moreover, as the ITC also noted, the record showed that imports were already increasing before the announced plant closings, and U.S. producers issued contemporaneous statements at the time of these plant closings confirming that low-priced competition from imports was an important part of their decisions.<sup>413</sup> In short, the ITC specifically concluded that the domestic producers did not voluntarily abandon the lower-priced part of the U.S. tire market, with subject imports simply filling the void left by their departure. We discuss these issues in more detail below.

**(c) The ITC Reasonably Considered Whether There Was Attenuated Competition In the Market**

225. China’s contention that the ITC failed to understand the attenuated nature of competition between Chinese and domestic tires in the U.S. market is also misplaced. China first takes issue with the ITC’s finding of “close substitutability” of imports from China for domestic tires, claiming that the ITC relied on “vague” evidence to support its finding.<sup>414</sup> However, there was nothing “vague” about these responses. The large majority of producers, importers, and purchasers, agreed that tires from China and tires produced in the United States were “always” or “frequently” used interchangeably.<sup>415</sup> It was perfectly reasonable for the ITC to rely on the broad consensus of market participants about the substitutability of the subject of U.S. tires when making its substitutability finding.<sup>416</sup> Moreover, these questionnaire responses were also consistent with other evidence on the record relating to substitutability. For example, the record showed that tires from China and tires from the United States compete in all segments of the market.<sup>417</sup> The interchangeability of subject imports and domestically produced tires was further confirmed by the fact that the ITC was able to conduct pricing comparisons of large quantities of shipments by U.S. producers and importers of subject tires all for six specific pricing products, with specific dimensions, load indexes, and speed ratings, in the large majority of quarters over the period.<sup>418</sup> In other words, this information showed that, in the view of the large majority of all market participants, whether they are producers, importers, or purchasers, market

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<sup>413</sup> ITC Report, pp. 26-27. Exhibit US-1.

<sup>414</sup> China First Submission, para. 223.

<sup>415</sup> ITC Report, p. 23. Exhibit US-1. Six out of seven U.S. producers, 21 out of 25 importers, and 18 out of 22 purchasers reported that tires from China and tires produced in the United States are “always” or “frequently” used interchangeably. ITC Report, Table V-6. Exhibit US-1. Any market participant that responded that tires from China and tires from the United States are “sometimes” or “never” used interchangeably” was given the opportunity to provide an explanation for this answer in the questionnaire.

<sup>416</sup> This is not a case where different sets of market participants had different views on the interchangeability of tires produced in China and tires produced in the United States, and the ITC was forced to make a credibility determination.

<sup>417</sup> ITC Report, p. 27. Exhibit US-1. As the ITC noted in its opinion, there was general agreement as to the existence of three categories of tires in the replacement market, there was less agreement as to which tires were included in the two lower-priced categories.

<sup>418</sup> ITC Report, Tables V-9-V-14. Exhibit US-1.

segmentation was not a bar to, or limit on the interchangeability of the subject and U.S. tires.<sup>419</sup> Accordingly, the ITC’s finding of close substitutability was supported by the record.

226. China next argues that the ITC failed to accord the appropriate weight to the U.S. producer’s involvement in the OEM market, and mistakenly found there was competition between Chinese and domestic tires in the OEM market.<sup>420</sup> Once again, China’s arguments are belied by the facts. In its determination, the ITC gave the appropriate weight to the evidence relating to China’s presence in the OEM market. First it, recognized that the vast majority of both imports of tires from China and domestically produced tires were sold in the replacement market.<sup>421</sup> Next, it correctly recognized that both Chinese and U.S. producers sold and competed in the OEM market as well.<sup>422</sup> In this regard, as the ITC found, the record showed that U.S. producer’s shipments to the OEM market declined steadily during this period to a period low 24.2 million tires in 2008, representing 17.7 percent of U.S. shipments in that year.<sup>423</sup> In contrast, import shipments from China increased irregularly from 121,000 tires in 2004 to a period high 2.3 million tires in 2008, representing five percent of imports from China in that year.<sup>424</sup> Thus, in

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<sup>419</sup> China alleges that the ITC relied on overly subjective and overbroad questionnaire data, which was what the panel in *Argentina Footwear* warned against. China First Submission, para. 223. Putting aside the notion of the different standards and requirements in the Safeguards Agreement context, China’s reliance on these statements is misplaced. In response to an ITC question regarding the interchangeability of subject imports and domestically produced tires, U.S. producers, importers, and purchasers overwhelmingly responded that subject tires and domestically produced tires were at least “frequently” interchangeable. ITC Report, p. 23. Exhibit US-1. No market participant expressed any difficulty in responding to the question due to market segmentation concerns.

The facts in *Argentina - Footwear* are clearly distinct. In *Argentina - Footwear* the panel noted that the investigating authority’s performed no analysis of the conditions of competition in the market, but simply summarized the conflicting views of domestic producers and importers. *Argentina - Footwear (Panel)*, para. 8.261, n. 557. The panel noted that the investigating authority conducted no price comparisons of imported and domestic footwear to support its references to “cheap imports,” despite the fact that its causation finding was based primarily on price considerations. *Argentina - Footwear (Panel)*, paras. 8.259, 8.261. The panel stated that the authority did not even analyze the effects of imported prices on the domestic industry, but indicated instead that it compared broad statistical indicators, resulting in conclusory statements. Moreover, the panel noted that the investigating authority itself acknowledged that its references to “cheap imports” had mostly to do with a problem of customs valuation and that the composition of imports had actually shifted to higher-valued goods. *Argentina - Footwear (Panel)*, para. 8.260. It was in the context of these glaring deficiencies that the panel stated that this “is not an analysis of the conditions of competition that is called for by Articles 2 and 4.2.” *Argentina - Footwear (Panel)*, para. 8.261. In this proceeding, the United States performed a much more rigorous analysis than in that case.

<sup>420</sup> China First Submission, para. 225.

<sup>421</sup> ITC Report, p. 21. Exhibit US-1. The ITC noted that the replacement market is by far the more important market for both types of producers, but stated that it was relatively more important to Chinese producers since a higher percentage of their shipments went to that market.

<sup>422</sup> ITC Report, p. 27. Exhibit US-1

<sup>423</sup> ITC Report, Tables V-2 and V-3. Exhibit US-1

<sup>424</sup> ITC Report, Tables V-2 and V-3. Exhibit US-1. Moreover, imports from China into the OEM market increased from 2.0 million tires in 2007 to 2.3 million tires in 2008 despite a 6.9 percent drop in apparent U.S. consumption that year. ITC Report, Table V-3 and Table C-1. In 2008, Chinese tires represented 4.9 percent of the OEM market. ITC Report, Table V-3.

every year of the period, there were considerable amounts of U.S. tires and an increasingly significant amount of subject imports in the OEM market. Accordingly, the facts on the record clearly supported the ITC’s finding that there was competition between imports from China and domestically produced tires in the OEM market.

227. Confronted with these facts, China now argues that competition between domestic and Chinese tires in the OEM market was “negligible” because Chinese tires amounted to approximately five percent of shipments to that market in 2008.<sup>425</sup> This assertion has no basis in the text of the Protocol or the facts on the record. First, there is no legal basis under the Protocol, for the ITC to ignore the impact of increasing volumes of subject imports in the OEM market because these imports accounted for only five percent of shipments in the market.<sup>426</sup> Second, the facts on the record showed that while U.S. producers’ U.S. shipments into the OEM market declined in every year of the period examined, shipments of imports from China increased in every year. Even from 2007 to 2008, when both domestically produced tires and non-subject import tires both declined in that sector, subject imports from China continued to grow, reaching their period high in 2008.<sup>427</sup> Accordingly, it was reasonable for the ITC to find a growing degree of competition between subject imports and domestically produced tires in the OEM market.

228. China also asserts that the ITC failed to adequately account for the fact that, within the replacement market, Chinese and domestic tires supposedly focused on different market segments.<sup>428</sup> This argument is simply wrong. The ITC gathered additional information on the issue of market segmentation, and addressed this issue at length and in detail in its determination.<sup>429</sup> The ITC rejected respondent’s claim that competition between U.S. produced tires and the subject imports was attenuated by virtue of the fact that subject tires and domestically produced tires supposedly competed in different segments of the market.<sup>430</sup>

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<sup>425</sup> China First Submission, para. 226.

<sup>426</sup> In fact, China’s apparent position that the ITC should ignore the increasing volumes of subject imports in the OEM market would presumably run afoul of the Protocol’s requirement that the investigating authority examine the volume of imports.

<sup>427</sup> China argues that because the absolute volumes of non-subject imports in the OEM market was higher than for the subject imports, non-subject imports must have been the cause of injury. China First Submission, para. 227. The mere fact that non-subject imports were also present in the OEM market does not affect the ITC’s finding that there was competition between Chinese imports and domestically produced tires. Moreover, unlike Chinese imports, non-subject imports did not experience volume increases in every year of the period examined, and in fact, declined from 2007 to 2008. China also concedes that non-subject tires were substantially higher priced than imports from China. China First Submission, para. 267 (“The USITC staff report indicated that the average unit price for all non-subject imports grew from \$40 to \$55 in the period, which is \$8-\$10 higher than imports from China.”)

<sup>428</sup> China First Submission, para. 229.

<sup>429</sup> ITC Report, p. 27. Exhibit US-1.

<sup>430</sup> ITC Report, p. 27. Exhibit US-1.



229. In its analysis, the ITC found that the U.S. replacement market could generally be segmented into three categories, but noted market participants did not agree on which tires fell into which categories.<sup>431</sup> Market participants also responded to the ITC’s supplemental questionnaires on this issue with a wide range of estimates of the share of U.S. producer’s and subject Chinese tire shipments falling into each category, further evidencing the fact that there was no bright line or industry-wide accepted dividing line between the three categories.<sup>432</sup>

230. Moreover, the information on the record did not support China’s argument that there was little competition between subject tires and U.S. tires in these categories. Instead, as the ITC noted, the record showed that both subject tires and U.S. produced tires competed in all three segments of the market in 2008, albeit to varying degrees. The ITC found that subject imports and the domestic product were both present in category one, and that both had a significant presence in categories two and three.<sup>433</sup> In 2008, 18.6 percent of U.S. producers’ U.S. shipments fell into category three, the category in which subject tires were most heavily concentrated. Additionally, as the ITC indicated, there was also a significant presence of both subject imports and domestically produced tires in category two.<sup>434</sup> Given that the record showed that there was significant competition between subject imports and U.S. tires in the market sectors in which subject imports were supposedly most heavily concentrated, the ITC reasonably rejected the claim that competition between subject and U.S. tires was attenuated.

231. It is important to recall that the domestic industry shipped 18.6 percent of its shipments into the category three sector in 2008, the last year of the period.<sup>435</sup> At that point the domestic industry had undertaken substantial reductions and plant closures to reduce its production of low-end tires, a decision that was made in reaction to the significant and increasing volume of subject imports from China.<sup>436</sup> Thus, any alleged lack of competition in that category by 2008 was significantly the result of the subject imports themselves. Since competition was not attenuated, the ITC reasonably rejected the idea that the subject imports had “little, if any, effect on the volume and price of U.S.-produced tires in the other market segments, and thus little effect on U.S. producers.”<sup>437</sup>

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<sup>431</sup> ITC Report, p. 27. Exhibit US-1.

<sup>432</sup> ITC Report, p. 27. Exhibit US-1.

<sup>433</sup> ITC Report, p. 27. Exhibit US-1.

<sup>434</sup> ITC Report, p. 27. Exhibit US-1.

<sup>435</sup> ITC Report, p. 27. Exhibit US-1.

<sup>436</sup> ITC Report, pp. 24-25. Exhibit US-1.

<sup>437</sup> ITC Report, p. 27. Exhibit US-1. China also argues that nonsubject imports had a more significant presence in the replacement market than subject imports. China fails to explain how the fact that nonsubject imports may have also been competing in this market has any effect on the ITC’s finding that there was significant competition between subject imports and the domestic product.

232. On a final note, respondents argued to the ITC that the facts in this investigation were similar to the facts in the *Brake Drums and Rotors* investigation, a case in which the ITC found that competition was attenuated.<sup>438</sup> The ITC disagreed. After noting that *Brake Drums and Rotors* was distinguishable because the industry had not been found to be materially injured, the ITC explained that the respondents in this proceeding had failed to show the degree of product differentiation between economy and premium products that existed in the brake drums and rotors market.<sup>439</sup>

233. In *Brake Drums and Rotors*, the ITC found that competition was attenuated because U.S. producers marketed domestically produced brake drums and rotors as brand-name premium products, but marketed the brake drums and rotors they purchased from Chinese and third-country producers as economy-line products.<sup>440</sup> The ITC contrasted those facts with the circumstances in *Tires* where U.S. tire manufacturers *actually sold* tires to the OEM market and *all three* segments of the replacement tire market. Moreover, unlike the distinctions between premium and economy brake pads and rotors seen in *Brake Drums and Rotors*, the ITC found that the passenger vehicle and light truck tires covered by the investigation consisted of a wide range of products along a quality, price, and performance spectrum. Thus, the ITC found that domestically produced tires compete with the subject imports in all product categories in which the subject imports are present.

234. In sum, the ITC’s determination addressed the issue of market segmentation in detail. Its finding of competition between U.S. produced tires and subject imports in all market segments was fully supported by the record. China’s argument that competition was so attenuated between U.S. produced tires and subject imports does not withstand scrutiny in light of the record in this proceeding.<sup>441</sup>

**ii. The ITC Established That There Was A Causal Link  
Between Increasing Imports and Material Injury**

**(a) The Legal Standard**

235. China argues that the ITC failed to establish that there was a temporal correlation, or “coincidence,” between the increases in subject import volumes during the period and declines in

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<sup>438</sup> *Certain Brake Drums and Rotors From China*, Inv. No-TA-421-3, USITC Pub. 3622 (Aug. 2003), pp. 4, 34-35. Exhibit US-17.

<sup>439</sup> ITC Report, p. 28. Exhibit US-1

<sup>440</sup> ITC Report, p. 28. Exhibit US-1

<sup>441</sup> In its submission, China also argues that the ITC neglected to examine several other alternative causal factors including increases in raw material costs, automation’s effect on productivity, the impact of gasoline prices on demand, and legacy costs. China First Submission, para. 234. China also argues that the ITC should have cumulatively assessed the effects of these factors in its analysis. China First Submission, paras. 233-238.

the industry's condition over the period of investigation.<sup>442</sup> Relying on Appellate Body and panel decisions related to the Safeguards Agreement, China claims that this sort of a “coincidence” analysis plays a central role in determining whether or not a causal link exists between increased imports and material injury or threat to an industry.<sup>443</sup> According to China, under the Protocol, increases in the subject imports must “coincide with a decline in the relevant injury factors,” and the absence of such a coincidence “would create serious doubts as to the existence of a causal link, and would require a very compelling analysis of why causation is still present.”<sup>444</sup> The United States does not agree that the Protocol contains this standard.

236. The Protocol instructs a competent authority to analyze certain specific criteria. It directs the authority to determine whether market disruption exists by considering whether imports “are increasing rapidly, either absolutely or relatively, so as to be a significant cause of material injury, or threat of material injury to the domestic industry.”<sup>445</sup> It also directs the authority to evaluate “objective factors, including the volume of such imports, the effect of imports on prices for like or directly competitive articles, and the effect of imports on the domestic industry producing like or directly competitive products” when performing this analysis.<sup>446</sup>

237. Aside from these factors, the Protocol contains no other specific guidance to a competent authority. It does not specify the criteria by which a competent authority should assess the “effect of imports . . . on the domestic industry,” nor does it instruct the authority to consider a specific set of indicia when assessing whether an industry is materially injured or threatened with material injury.<sup>447</sup> Nor does it contain any language indicating that the competent authority should assess whether there is a coincidence of trends between increasing imports and the declines in the condition of the industry analysis, or suggest that an authority must provide a “compelling analysis of why causation is still present” if such a coincidence does not exist.<sup>448</sup>

238. Since the Protocol does not require such an analysis, the competent authority is free to choose and use any appropriate methodology it wishes as long as that methodology is not inconsistent with the specific requirements of the Agreement.<sup>449</sup> In other words, China has no basis for asserting that the ITC was required to perform a “coincidence of trends” analysis in its

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<sup>442</sup> China First Submission, para. 239-248.

<sup>443</sup> China First Submission, para. 240. In this regard, we note that China concedes that the domestic industry is materially injured. China First Submission, para. 185 n.185.

<sup>444</sup> China First Submission, para. 240 (citing *Argentina - Footwear (Panel)*, para. 8.238 and *Argentina - Footwear (AB)*, paras. 144-145.

<sup>445</sup> Protocol of Accession, para. 16.4.

<sup>446</sup> Protocol of Accession, para. 16.4.

<sup>447</sup> Protocol of Accession, para. 16.

<sup>448</sup> Protocol of Accession, para. 16.

<sup>449</sup> See, e.g., *EC - Tube (AB)*, para. 189.

determination, or that it must provide “a compelling analysis of why causation is still present” if that coincidence does not exist.

239. China’s argument that the ITC must perform such an analysis reflects a misunderstanding of Appellate Body analysis of the Safeguards Agreement. It is true, as China states in its submission, that the Appellate Body and panels have stated that under the Safeguards Agreement an investigating authority should typically be able to establish that there is a “coincidence of trends” between increased imports and injury, and that, in the absence of such a coincidence, it must provide a “compelling analysis of why causation is still present.”<sup>450</sup> However, the Appellate Body has specifically linked this requirement to the specific language of Articles 4.2 (a) - (b) of the Safeguards Agreement, stating that “the words ‘rate and amount’ and ‘changes’ in Article 4.2(a) mean that ‘the *trends* – in both the injury factors and the imports – matter as much as their absolute levels.’”<sup>451</sup>

240. The Protocol does not include language similar to this. Given this, the Appellate Body’s or panel statements about the need for a “coincidence of trends” analysis, or a “compelling analysis” of causation in the absence of such a coincidence, in the global safeguards context are not particularly meaningful in the context of a determination under the Protocol. As a result, China’s emphasis on such analysis in its submission is misplaced.<sup>452</sup>

241. Moreover, even if the “coincidence of trends” analysis were somehow implicitly required under the Protocol, China’s arguments must fail. China’s challenges to the ITC’s analysis are premised on the concept that even a minor variation in the trends establishes that there is not a “coincidence of trends” between increasing imports and material injury. However, with respect to the Safeguards Agreement, WTO panels have explained that the “overall coincidence [in trends] is what matters and not whether coincidence or lack thereof can be shown in relation to a few select factors which the competent authority has considered.”<sup>453</sup> As stated by the panel in *U.S. – Wheat Gluten*:

[I]n light of the overall coincidence of the upward trend in increased imports and the negative trend in injury factors over the period of investigation, the existence of slight absences of coincidence in the

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<sup>450</sup> *Argentina - Footwear (Panel)*, para. 8.238 and *Argentina - Footwear (AB)*, paras. 144-145.

<sup>451</sup> As the Appellate Body has stated in the context of the Safeguards Agreement and the Anti-Dumping Agreement, the Appellate Body has stated that an investigating authority “is free to choose the methodology it will use in examining the ‘causal relationship’ between [unfair] imports and injury.” *EC – Pipe Fittings (AB)*, para. 189 *US - Hot-Rolled Steel (AB)*, para. 224.

<sup>452</sup> In fact, under the Antidumping and Subsidies Agreements, WTO panels have specifically concluded that there is “no generalized requirement to establish a temporal correlation between increased imports and injury in the context of a countervail investigation.” *EC – DRAMS (Panel)*, para. 7.399 n.277; *see US – DRAMS CVD (Panel)* para. 7.319 n.283.

<sup>453</sup> *US – Steel Safeguards (Panel)*, para. 10.320.

movement of individual injury factors in relation to imports would not preclude a finding by the USITC of a causal link between increased imports and serious injury.<sup>454</sup>

In other words, under the Safeguards Agreement, being able to point to one or two variations in trends for one or two factors in one year of the period is not enough to establish there is not a causal link between increased imports and injury, as China appears to believe.

242. Finally, we would point out that the ITC did, in fact, use a “coincidence of trends” analysis here. In its conclusion, for example, it specifically stated that the rapid increases in the volumes of the subject imports from China “coincided with significant underselling of the domestic products by the subject imports,” and “coincided with the sharp decline in the domestic industry’s performance indicators.”<sup>455</sup> Nonetheless, even though the ITC performed a “coincidence” analysis, the Panel should not engraft onto its analysis here standards and concepts that have been developed under, and are dependent on, the text of the Safeguards Agreement.

243. The Panel should not assess whether the ITC performed the same type of coincidence analysis that may be required under the Safeguards Agreement. Instead, the Panel should seek to assess whether the ITC has complied with its obligation under Protocol, which is to provide a “reasoned” explanation of the basis for its finding that there was a causal link between increasing imports and the industry’s injury. Because the ITC did so, the Panel should find that it has complied with its obligations under the Protocol.

### **(b) The ITC Conducted a Reasoned Causation Analysis**

244. As discussed above, the Protocol directs a competent authority to assess whether imports are “increasing rapidly” and to consider the volume of imports, their effect on domestic prices, and their effect on the industry.<sup>456</sup> By its terms, however, paragraph 16.4 of the Protocol does not prescribe the manner in which the results of a competent authority’s causation analysis are to be set out, nor the type of evidence that must be produced to demonstrate that this evaluation was indeed conducted. In this proceeding, the ITC provided a reasoned and detailed analysis of these injury factors in its determination, and provided a reasoned and reasonable explanation as to the “effect” subject imports had on the domestic industry during the period.

245. In its analysis, the ITC explained that subject imports increased, both absolutely and relatively, throughout the entire period, and by significant amounts in each year of the period. It also noted that subject imports were at their highest levels at the end of 2008. As the ITC stated,

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<sup>454</sup> *US – Wheat Gluten (Panel)*, para. 8.101.

<sup>455</sup> ITC Report, p. 29. Exhibit US-1.

<sup>456</sup> Protocol of Accession, par. 16.4.

“whether viewed in absolute or relative terms, and whether viewed in terms of the increase from 2007 to 2008 alone or the increase in the last two full years (or even the last three years), the increases were large, rapid, and continuing at the end of the period – and from an increasingly large base.”<sup>457</sup>

246. Having taken the rapidly increasing subject imports into account, the ITC then properly explained the “effect” that these imports were having on the domestic industry. The ITC analyzed the data on import volumes, import prices, and the declines in the domestic industry’s condition in detail,<sup>458</sup> and then summed up its findings on this issue as follows:

The significant increase in the volume of such imports coincided with significant underselling of the domestic products by the subject imports. It also coincided with the sharp decline in the domestic industry’s performance indicators. The rising volume of subject imports from China displaced domestic sales, and this displacement has led to declining domestic production, shipments, capacity utilization, employment, and profitability.<sup>459</sup>

247. The ITC’s extended analysis alone satisfies the requirements of the Protocol as it addresses subject import volumes, prices, and effect on the domestic industry. In fact, the ITC’s analysis goes beyond what is required under the Protocol by addressing factors not there specified. As the ITC stated, there was a clear overall “coincidence” in trends between the rapidly increasing imports and their effects on the domestic industry. As imports increased both absolutely and relatively in every year of the period, the domestic industry suffered:

- significant declines in capacity in every year of the period,<sup>460</sup>
- significant declines in production in every year of the period,<sup>461</sup>
- significant declines U.S. shipments by quantity in every year of the period,<sup>462</sup>

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<sup>457</sup> ITC Report, p. 12. Exhibit US-1.

<sup>458</sup> ITC Report, pp. 22-29. Exhibit US-1.

<sup>459</sup> ITC Report, p. 29. Exhibit US-1.

<sup>460</sup> U.S. producers’ capacity declined from 226.8 million tires in 2004 to 222.9 million tires in 2005, declined to 215.2 million tires in 2006, declined to 196.3 million tires in 2007, and declined to a period low 186.4 million tires in 2008. ITC Report, Table C-1. Exhibit US-1.

<sup>461</sup> U.S. producers’ production declined from 218.4 million tires in 2004 to 207.8 million tires in 2005, declined to 184.8 million tires in 2006, declined to 180.3 million tires in 2007, and declined to a period low 160.3 million tires in 2008. ITC Report, Table C-1. Exhibit US-1

<sup>462</sup> U.S. producers’ U.S. shipments by quantity declined from 194.7 million tires in 2004 to 181.8 million tires in 2005, declined to 163.8 million tires in 2006, declined to 155.7 million tires in 2007, and declined to a period low 136.8 million tires in 2008. ITC Report, Table C-1. Exhibit US-1

- significant declines in net sales quantities in every year of the period,<sup>463</sup>
- significant declines in market share in every year of the period,<sup>464</sup>
- significant declines in production and related workers in every year of the period,<sup>465</sup>
- significant declines in wages paid in every year of the period,<sup>466</sup> and
- significant declines in hours worked in every year of the period.<sup>467</sup>

Moreover, as the ITC also explained, U.S. industry suffered declines in operating income,<sup>468</sup> operating margins,<sup>469</sup> capacity utilization,<sup>470</sup> and productivity<sup>471</sup> of the domestic industry in three out of four years of the period, and all, except for capacity utilization,<sup>472</sup> were at their lowest

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<sup>463</sup> U.S. producers' net sales by quantity declined from 221.8 million tires in 2004 to 209.1 million tires in 2005, declined to 190.5 million tires in 2006, declined to 180.1 million tires in 2007, and declined to a period low 159.1 million tires in 2008. ITC Report, Table C-1. Exhibit US-1

<sup>464</sup> U.S. producers' market share declined from 63.3 percent in 2004 to 59.6 percent in 2005, declined to 56.2 percent in 2006, declined to 52.6 percent in 2007, and declined to a period low 49.6 percent in 2008. ITC Report, Table C-1. Exhibit US-1.

<sup>465</sup> U.S. producers' production and related workers declined from 36,411 in 2004 to 35,595 in 2005, declined to 34,037 in 2006, declined to 31,842 in 2007, and declined to a period low 31,243 in 2008. ITC Report, Table C-1. Exhibit US-1.

<sup>466</sup> U.S. producers' wages paid declined from \$1.79 billion in 2004 to \$1.78 billion in 2005, declined to \$1.76 billion in 2006, declined to \$1.65 billion in 2007, and declined to a period low \$1.57 billion in 2008. ITC Report, Table C-1. Exhibit US-1.

<sup>467</sup> U.S. producers' hours worked declined from 76.0 million in 2004 to 73.6 million in 2005, declined to 69.7 million in 2006, declined to 67.2 million in 2007, and declined to a period low 63.0 million in 2008. ITC Report, Table C-1. Exhibit US-1.

<sup>468</sup> U.S. producers' operating income declined from \$256.2 million in 2004 to \$165.5 million in 2005, declined to a loss of \$114.5 million in 2006, increased to \$507.2 million in 2007, and declined to a period low loss of \$262.8 million in 2008. ITC Report, Table C-1. Exhibit US-1.

<sup>469</sup> U.S. producers' operating margins declined from 2.4 percent in 2004 to 1.5 percent in 2005, declined to negative 1.1 percent in 2006, increased to 4.5 percent in 2007, and declined to a period low negative 2.4 percent in 2008. ITC Report, Table C-1. Exhibit US-1.

<sup>470</sup> U.S. producers' capacity utilization declined from 96.3 percent in 2004 to 93.2 percent in 2005, declined to 85.9 percent in 2006, increased to 91.9 percent in 2007, and declined to 86.0 percent in 2008. ITC Report, Table C-1. Exhibit US-1.

<sup>471</sup> U.S. producers' productivity (tires per hour) declined from 2.9 tires per hour in 2004 to 2.8 tires per hour in 2005, declined to 2.6 tires per hour in 2006, increased to 2.7 tires per hour in 2007, and declined to a period low of 2.5 tires per hour in 2008. ITC Report, Table C-1. Exhibit US-1.

<sup>472</sup> Capacity utilization was 0.1 percentage point higher in 2008 than its lowest level in 2006. ITC Report, Table C-1. Exhibit US-1.

levels for the period in 2008 when subject import volumes and market share were at their greatest.<sup>473</sup>

248. China alleges that there was a lack of coincidence between subject import trends and the domestic industry's deteriorating condition, relying on the lack of coincidence in the movement of a few individual injury factors in relation to imports in a single year. This does not preclude a finding by the ITC that subject imports were a material cause of injury to the domestic industry. First, China's arguments unreasonably assume that all effects from the low-priced tire imports from China will be immediate. This approach ignores the fact that China's own submission shows that the volume of imports from China were accelerating on even a quarterly basis in 2007 with the largest quarterly volume in the fourth quarter of 2007.<sup>474</sup> Given this, it is not surprising that at least some of the impact of such massive increases in imports from China would extend into 2008 and not be entirely captured in 2007.

249. Second, even under the stricter causation standard required under the Safeguards Agreement, panels have recognized that an authority is not required to establish a coincidence in trends for every factor and for all years of the period examined. Instead, they have recognized that an overall coincidence in trends is sufficient to satisfy causation.<sup>475</sup> For example, in *US – Wheat Gluten*, the Panel noted "that when one looks at the trends in imports *vis-a-vis* the trends in certain *individual* injury factors in *isolation*, several of these injury factors were declining prior to the surge in imports found by the USITC in 1996-1997."<sup>476</sup> In particular, the Panel noted that profitability, capacity utilization, and sales all declined before the surge in imports. For example, the panel found that even in the face of increasing imports, "several injury factors actually improved," including the industry's sales, hourly wages, and inventories.<sup>477</sup>

250. Nevertheless, the panel in *US – Wheat Gluten* found that there was an overall coincidence in trends.<sup>478</sup> The panel noted that many of the injury factors declined over the period as imports were increasing. Specifically, the panel noted that sales, production, inventories, and capacity utilization showed an overall negative trend during the period, and that the domestic industry was operating at a loss by the end of the period.<sup>479</sup> For these reasons, the panel found that the ITC's determination in that case "indicates a general coincidence of trends and that it contains an adequate, reasoned and reasonable explanation of how the facts supports its finding with respect to this aspect of the causation analysis."<sup>480</sup>

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<sup>473</sup> ITC Report, Table C-1. Exhibit US-1.

<sup>474</sup> China First Submission, para. 149.

<sup>475</sup> *US– Wheat Gluten (Panel)*, para. 8.102; *US – Steel Safeguards (Panel)*, para. 10.302.

<sup>476</sup> *US– Wheat Gluten (Panel)*, para. 8.100.

<sup>477</sup> *US– Wheat Gluten (Panel)*, para. 8.100.

<sup>478</sup> *US– Wheat Gluten (Panel)*, para. 8.102.

<sup>479</sup> *US– Wheat Gluten (Panel)*, para. 8.101.

<sup>480</sup> *US– Wheat Gluten (Panel)*, para. 8.102.



251. The ITC provided a similarly reasoned explanation that established an overall coincidence in import and industry condition trends. As subject imports increased both absolutely and relatively in every year of the period, virtually all of the domestic industry's performance indicators declined as well. As the ITC explained in its determination, the underselling by large and rapidly increasing subject Chinese tires eroded the domestic industry's market share, leading to a substantial reduction since 2004 in domestic capacity, production, shipments, and employment.<sup>481</sup> Moreover, the evidence showed that all of these indicators were at their lowest levels in 2008 when subject imports were at their highest.<sup>482</sup> Even though some factors, such as profitability and productivity, improved somewhat in a single year - 2007 - when imports continued to increase, numerous other injury factors including capacity, shipments, net sales quantities, market share, and employment-related factors all continued to decline in that year.<sup>483</sup> Moreover, even the improvement in profitability and productivity was temporary given that both factors declined in 2008 to levels below the start of the period, at the same time subject imports rose to their highest levels both in terms of absolute volume and market share.<sup>484</sup>

252. Accordingly, an examination of the overall trends in imports and the overall trends in the condition of the industry over the period examined, as well as the ITC's reasoned explanation of these trends, supports a finding by the ITC of a causal connection between increased imports and material injury.

### (c) China's Arguments on Causation Lack Merit

253. The ITC's causation analysis reasonably considered the coincidence in trends on an overall level. China takes issue with the ITC's causation analysis by attacking each factor the ITC examined in isolation. This is not the appropriate analysis. As panels have explained, under the Safeguards Agreement, it is the overall coincidence in trends that matter, not whether there are individual variations in the trends.<sup>485</sup> Nonetheless, we will address each factor in the same order as presented in China's submission.

#### (i) Prices

254. Paragraph 16.4 of the Protocol states that an investigating authority shall consider, among other things, "the effect of imports on prices for like or directly competitive articles" to determine if market disruption exists.<sup>486</sup> In the *Tires* investigation, the ITC conducted a detailed and thorough evaluation of pricing in the tires market, and explained how the persistent and

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<sup>481</sup> ITC Report, p. 24. Exhibit US-1.

<sup>482</sup> ITC Report, Table C-1. Exhibit US-1.

<sup>483</sup> ITC Report, Table C-1. Exhibit US-1

<sup>484</sup> ITC Report, Table C-1. Exhibit US-1

<sup>485</sup> *US– Wheat Gluten (Panel)*, para. 8.100; *US – Steel Safeguards (Panel)*, para. 10.302.

<sup>486</sup> Protocol of Accession, para. 16.4.

significant underselling by subject imports contributed to the deteriorating condition of the domestic industry.<sup>487</sup>

255. To conduct its pricing analysis, the ITC collected quarterly data over the period examined for six specific products, each of which was defined by specific dimensions, load indexes, and speed ratings of each to ensure compatibility.<sup>488</sup> These pricing products accounted for a significant amount of domestic producer's U.S. shipments and subject import shipments.<sup>489</sup> As the ITC stated, these comparisons showed underselling by the subject imports in 119 out of 120 comparisons, with the average margins of underselling at their highest in 2007 and 2008, coinciding with the largest volumes of subject imports.<sup>490</sup> As the ITC found, the consistent underselling by the large and rapidly increasing volume of subject tires displaced domestic shipments by U.S. producers, and eroded the domestic industry's market share, leading to a substantial reduction since 2004 in domestic capacity, production, shipments, and employment during the period examined. The ITC also noted continued underselling by the subject imports prevented domestic producers from raising prices sufficiently to offset higher production costs and thus suppressed prices.<sup>491</sup>

256. Initially, China argues that there is no temporal connection between increasing imports and domestic prices because domestic prices rose during the period.<sup>492</sup> This observation is irrelevant, as the ITC did not find that the subject imports had caused price *depression* (a decline in domestic prices) in this case. Instead, as we pointed out, the ITC found that there were two significant effects from the consistent underselling by the subject imports. First, this underselling had a negative impact on the volume of the sales and the market share of the domestic industry as the subject imports gained 11.9 percentage points of market share from the domestic industry over the period.<sup>493</sup> Second, this underselling caused price suppression, because consistent

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<sup>487</sup> ITC Report, pp. 23-29. Exhibit US-1.

<sup>488</sup> ITC Report, V-23-24. . Exhibit US-1. Despite China's argument that different speed ratings cause the ITC data to be unreliable, one of respondent's own witnesses testified in this case that product 3 (which is the only passenger vehicle price product to have three speed ratings) "is a commodity tire size and that there is little difference in the S, T, and H speed ratings in that particular size. *Id.* at V-35 citing Hearing Transcript, p. 304 (Berra). Exhibit US-1.

<sup>489</sup> ITC Report, p. 23 n. 128. Exhibit US-1.

<sup>490</sup> ITC Report, Tables V-9-V-14 and Table C-1. Exhibit US-1.

<sup>491</sup> ITC Report, p. 24. Exhibit US-1. The ITC stated that the ratio of cost of goods sold to net sales increased by 5.4 percentage points over the period, and that the sharp increase in this ratio in 2008, when the volume of subject imports was highest and the margins of underselling was nearly at its greatest, indicated that U.S. producers faced a cost-price squeeze and were unable to pass increasing raw material costs along to their customers. ITC Report, p. 24. Exhibit US-1. The ITC also noted that it received information from three domestic producers that they either had to reduce prices or roll back announced price increase to avoid losing sales to subject tires from China. ITC Report, p. 24. Exhibit US-1.

<sup>492</sup> China First Submission, para. 250.

<sup>493</sup> ITC Report, Table C-1. Exhibit US-1.

underselling by the subject imports prevented domestic producers from raising prices sufficiently to offset increasing costs.<sup>494</sup>

257. China attempts to avoid compelling evidence that underselling by subject imports led to declines in the domestic industry’s production, sales volume, and market share, by arguing that the price comparison data collected by the ITC is “unreliable” because it does not define the price comparison products in a specific enough manner.<sup>495</sup> China’s argument has no foundation. The ITC defined its price comparison products in a highly specific manner that allowed it to perform an apples-to-apples comparison of prices of subject and domestic tires. For example, the ITC defined pricing product number 1 by tire size (P225/60R16), load index (97-98), speed rating (S or T), and distribution channel (replacement market).<sup>496</sup> Similarly, the ITC defined pricing product number 5 by tire size (LT245/75R16), load index (111-116), and speed rating R or S).<sup>497</sup> Given the specificity of these products, the ITC reasonably decided that these product definitions were sufficiently narrow to perform price comparisons. Moreover, given that the large majority of market participants reported that tires from China and domestically produced were “always” or “frequently” interchangeable,<sup>498</sup> it was entirely reasonable for the ITC to rely on this pricing data as a basis for assessing whether the subject imports were underselling the U.S. tires.

258. China also claims that the ITC’s price comparison data are unreliable because U.S. producers’ ship a much higher percentage of their tires into the more expensive OEM market. China’s argument is entirely unfounded. As is clear from the price comparison tables for all six pricing products, the ITC’s price comparison data compared prices for subject and U.S. tires only on sales into the replacement market.<sup>499</sup> No shipments to the OEM market were included in these price comparisons. Thus, the fact that more U.S. tires were sold into the OEM sector than subject tires does not affect the validity of the ITC’s actual price comparisons in any way. The ITC’s pricing data reliably and indisputably showed that the subject imports were underselling U.S. tires in virtually all price comparisons in the replacement market throughout the period.<sup>500</sup>

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<sup>494</sup> ITC Report, p.24. Exhibit US-1.

<sup>495</sup> China First Submission, para. 260.

<sup>496</sup> ITC Report, V-23. Exhibit US-1.

<sup>497</sup> ITC Report, V-23. Exhibit US-1.

<sup>498</sup> In light of the specific facts of this case, China’s reliance on *Argentina - Footwear* is misplaced. In *Argentina - Footwear* the investigating authority acknowledged that it conducted no detailed price analysis when it referred to “cheap” imports, despite a very broad product definition and contrary evidence on the record. *Argentina - Footwear (Panel)*, para 8.261 n.557. The facts of that case stand in stark contrast to the ITC’s detailed pricing analysis for six specifically defined pricing products, and the agreement amongst market participants that subject imports and domestically produced tires were at least “frequently” interchangeable.

<sup>499</sup> ITC Report Tables V-9-V-14. Exhibit US-1. These tables specify that the price comparisons are for shipments to the replacement market only. Shipments to the OEM market are in a separate table, V-15.

<sup>500</sup> Moreover, China also ignores the fact that in 69 of 78 quarters, the prices of U.S.-produced tires sold to the OEM market were lower than the prices of comparable U.S.-produced tires sold to the replacement market. ITC Report, V-35. Exhibit US-1.

259. Finally, China argues that the ITC had no evidentiary basis for finding that the subject imports suppressed domestic prices over the period examined.<sup>501</sup> China acknowledges, however, that the ratio of costs to goods sold increased in every year of the period but one (2007).<sup>502</sup> It argues, that any price suppression during the period could not have been caused by subject imports because the ratio of cost of goods sold (“COGS”) to sales declined in 2007, when subject imports increased at the greatest rate. This one year anomaly in 2007 is not enough to show that overall coincidence is not present. As the ITC noted, in every other year of the period the ratio of cost of goods sold to sales increased, thus corresponding with increases in the volumes of subject imports in every year. Moreover, the drop in this ratio in 2007 was explained, in large part, by a drop in the rate of increase for the industry’s unit COGS that year. From 2004 to 2005 unit COGS increased by 10.6 percent, from 2005 to 2006 to by 13.6 percent, and from 2007 to 2008 by 16.2 percent.<sup>503</sup> In 2007, however, unit COGS increased by only 4.3 percent, by far its slowest rate of increase over the period.<sup>504</sup>

260. In other words, in 2007, the domestic industry received temporary relief from the cost-price squeeze it experienced during the period because its costs did not increase at the same rate as they had in the past. This drop in costs had nothing to do with the rapidly increasing levels of subject imports. In 2008, however, when unit COGS again increased at a more typical rate, the ratio of cost of goods sold to sales revenues increased to its highest level of the period because domestic producers could once again not increase prices to offset rising costs. This coincided with subject imports reaching their highest levels in terms of absolute volumes and market share, even though apparent consumption declined in that year.<sup>505</sup>

261. In sum, the ITC’s findings on price are supported by the record. The evidence showed that increasing volumes of highly substitutable subject imports from China pervasively undersold the domestic like product and were therefore able to gain market share from the domestic industry. This displacement of market share by subject imports had a negative effect on the domestic industry as it was forced to adapt to recover costs on a reduced volume of sales.

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<sup>501</sup> China First Submission, para. 254.

<sup>502</sup> China First Submission, para. 257.

<sup>503</sup> ITC Report, Table C-1. Exhibit US-1.

<sup>504</sup> ITC Report, Table C-1. Exhibit US-1.

<sup>505</sup> China’s attempt to blame nonsubject imports for any alleged price suppression is similarly unavailing. As China concedes in its submission, the average unit values for nonsubject imports were well above the average unit values for subject imports throughout the period. China First Submission, para. 267. Moreover, the absolute volumes and market share for nonsubject imports remained relatively steady over the period, contrasted with the significant increases in both volume and market share by subject imports. Accordingly, the ITC’s finding that undersold subject imports, not nonsubject imports, displaced domestic sales, is fully supported by the record.

**(ii) Production**

262. China also claims that the trends in the industry’s production volumes do not correlate with rapidly increasing imports from China. According to China, there is no coincidence in trends for these factors because domestic producers’ production volume dropped by only 2.4 percent in 2007, the same year subject imports from China increased at their highest rate of the period.<sup>506</sup>

263. At the outset, we note that imports from China increased in every year of the period examined, and that those increases were significant. Moreover, domestic production fell in every year of the period, with production falling by 4.8 percent in 2005, 11.0 percent in 2006, 2.4 percent in 2007, and 11.1 percent in 2008.<sup>507</sup> Moreover, the percentage declines in domestic production were significantly larger than the percentage declines in apparent consumption in every year of the period.<sup>508</sup> In fact, even in 2008, when apparent consumption declined by 6.9 percent, the percentage decline in domestic production fell by almost double that rate, 11.1 percent. Thus, there was an obvious correlation in trends between growing import levels and declines in the industry’s production levels in each year of the period.

264. China alleges that the precipitous drop in U.S. production in 2008 was caused solely by the collapse of the auto industry and the recession. China fails to acknowledge, however, that the volume of subject imports increased by almost 11 percent in that year, even in the face of the 6.9 percent decline in apparent consumption in 2008.<sup>509</sup> Because of this increase and because nonsubject imports actually *declined* in 2008, the increases in imports from China in that year actually directly correlated with, and were a significant cause of, the declines in the industry’s production levels and market share in that year.<sup>510</sup> In light of this data, China’s arguments that there was no correlation between rapidly increasing subject imports and production declines for the domestic industry show betray a misunderstanding of the record before the ITC.

265. China also asserts that the ITC “conveniently ignored” that U.S. producers were globalizing their productions for a variety of business reasons other than subject imports, and that this lack of discussion was “disingenuous.”<sup>511</sup> In fact, the ITC explicitly considered this very issue in its determination and specifically rejected respondents’ contention that domestic producers voluntarily abandoned the lower-priced tires market.<sup>512</sup> Relying on record evidence,

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<sup>506</sup> China First Submission, paras. 269 - 270.

<sup>507</sup> ITC Report, Table C-1. Exhibit US-1.

<sup>508</sup> ITC Report, Table C-1. Exhibit US-1.

<sup>509</sup> Contrast the large increase in subject imports in 2008 to the 6.1 percent decline in nonsubject imports that same year. ITC Report, Table C-1. Exhibit US-1.

<sup>510</sup> ITC Report, Table C-1. Exhibit US-1.

<sup>511</sup> China First Submission, paras. 271.

<sup>512</sup> ITC Report, p. 26. Exhibit US-1.

including contemporaneous statements by the domestic producers themselves, the ITC found that the more reasonable explanation for U.S. producer’s capacity reductions during the period was a reaction to increasing subject imports that were already occurring and likely to continue in the future.<sup>513</sup>

### **(iii) Net Sales**

266. As China correctly notes, the trends in net sales largely follow the trends for production.<sup>514</sup> Faced with increasing volumes of subject imports in every year of the period examined, the U.S. industry’s net sales quantities declined in every year of the period, and did so at a faster rate than the decline in apparent consumption.<sup>515</sup> In 2007, the only year in which apparent consumption increased, net sales quantity still declined by 5.5 percent, which correlated with the significant increase in subject imports in that year.<sup>516</sup> In 2008, when subject imports increased to their highest levels of the period, U.S. producers’ net sales quantities dropped by 11.7 percent, almost double the percentage drop in apparent consumption.<sup>517</sup> This evidence shows a clear correlation between rapidly increasing subject imports and declines in the domestic industry’s net sales volumes.

### **(iv) Market Share**

267. As China also correctly notes, the market share of the subject imports increased by almost 12 percentage points over the period while the domestic industry’s market share declined by 13.7 percentage points. Because there was virtually a one-to-one correlation between the increases in subject imports’ market share and the declines in the domestic industry’s market share, China repeats many of the same arguments it makes about the lack of correlation for other factors in an attempt to show that subject imports did not displace the domestic industry’s market share. These arguments fail to cast any doubt on the clear correlation between gains by China and losses by the domestic industry in terms of market share.

268. For example, China again takes issue with the ITC’s finding of “close substitutability” between domestic tires and subject imports. As we previously explained, this finding was clearly supported by the record evidence. The close substitutability of the subject import and U.S. tires coupled with pervasive underselling by subject imports throughout the period, helps to explain

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<sup>513</sup> ITC Report, pp. 26-27. Exhibit US-1. Again, we discuss this matter in detail below

<sup>514</sup> China First Submission, para. 273.

<sup>515</sup> ITC Report, Table C-1. Exhibit US-1.

<sup>516</sup> In 2007, apparent consumption increased only because increases in subject imports from China outpaced declines in both U.S. producers U.S. shipments and nonsubject imports. ITC Report, Table C-1. Exhibit US-1.

<sup>517</sup> Supporting the clear trends shown in the data, two of the eight domestic producers reported they lost sales to subject imports. ITC Report, V-36. Exhibit US-1.

how subject imports were so successful in taking market share from the domestic industry in every year of the period.

269. China next argues that the ITC’s displacement theory fails to account for the fact that the U.S. industry adopted a global sourcing strategy in order to help it weather contracting U.S. demand.<sup>518</sup> As discussed above, the ITC considered this global sourcing strategy argument and specifically rejected it as an explanation for the pervasive displacement of market share by subject imports throughout the period.<sup>519</sup>

270. Moreover, the fact that some domestic producers chose to import subject tires during the period examined does not in any way undermine the ITC’s causation analysis. The language of the Protocol does not distinguish between rapidly increasing subject imports that are imported by the domestic industry and those that are imported by other companies. As the ITC noted in its determination, several U.S. producers were forced to close plants due to low-priced subject imports.<sup>520</sup> The fact several of these domestic producers have chosen to import subject imports to service some of their purchasers does not change the fact low-priced subject imports caused them to shut down production in the first place.<sup>521</sup> Additionally, just because some domestic producers imported subject merchandise for their own benefit, does not mean that those subject imports were not having an effect on the domestic industry as a whole, an analysis required under paragraph 16.4 of the Protocol.<sup>522</sup>

271. China next argues that the domestic industry could not have been injured by subject imports because it was able to turn a profit in 2007, the year the domestic industry experienced its second highest decline in market share during the period.<sup>523</sup> As we previously noted, the domestic industry lost market share and saw its production, sales, and shipments quantities decline in every year of the period examined, including 2007. The fact that the domestic industry was able to turn a profit in one of those years despite the loss of market share, does not establish that domestic producers were not injured by subject imports, especially since the profit was small and turned to a loss the following year as the domestic industry’s market share fell even further.

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<sup>518</sup> Throughout its submission China cites to the dissenting views. The dissenting views are not the determination or recommendation of the U.S. competent authority, and simply reflect the dissent’s interpretation of the evidence on the record. The only views pertinent to this dispute are those expressed in the ITC majority determination.

<sup>519</sup> ITC Report, pp. 24-25. Exhibit US-1.

<sup>520</sup> ITC Report, p. 26. Exhibit US-1.

<sup>521</sup> As a share of the quantity of total imports, U.S. producers’ imports from China actually declined irregularly from 20.9 percent in 2004 to 17.4 percent in 2008. ITC Report, Table II-3. Exhibit US-1.

<sup>522</sup> As China correctly notes, paragraph 16 addresses only the impact of “products of Chinese origin [that] are being imported into the territory” of another WTO member. Protocol of Accession, para. 16.1.

<sup>523</sup> China First Submission, para. 283.

272. China also argues that the ITC’s market share analysis ignored important differences between the OEM market and the aftermarket.<sup>524</sup> China’s argument ignores the fact that the domestic industry lost market share in *both* markets in every year of the period and subject imports gained market share in *both* markets in every year of the period.<sup>525</sup>

273. Finally, China argues that the ITC failed to place the market share data in proper context because total consumption of tires in the United States declined over the period.<sup>526</sup> This argument is difficult to understand. The drop in apparent consumption over the period makes the effect of increasing volumes of subject imports on the industry in every year of the period even more pronounced. Because demand was declining, and the share of nonsubject imports remained relatively steady over the period, the increasing volumes of subject imports took market share directly from the domestic industry by definition. This is a classic case of market share displacement, and the evidence on the record fully supported the ITC’s finding as such.

#### (v) Profits

274. China argues that, as a threshold matter, profits do not correlate with rapidly increasing imports from China because operating income was positive for U.S. producers in three out of five years of the period. China fails to grasp that the ITC examined the correlation between increasing subject imports and trends in the industry’s operating income. While the domestic industry began the period with positive operating income in 2004, its operating income steadily fell in both 2005 and 2006, and turned to a loss in 2006. After a short recovery in 2007, the industry’s profitability fell to its worst levels in 2008.<sup>527</sup> In fact, over the period examined, the domestic industry’s operating margins fell by 4.8 percentage points. Although China suggests that the decline in the industry’s operating margins in 2008 was due exclusively to the recession, the fact remains that the decline in operating margins in 2008 was consistent with the general declines in the industry’s profitability over the period.<sup>528</sup> Moreover, these declines occurred when import volumes and market share were at their highest levels for the period, and underselling margins were nearly at their highest levels.

275. It is true, as China notes, that in 2007 the domestic industry turned a small profit, notwithstanding the consistent increases in subject imports. Despite this one positive indicator, however, U.S. producers’ capacity, production, net sales quantity, market share, production workers, and wages paid all declined in 2007, falling to period lows that year.<sup>529</sup> In other words,

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<sup>524</sup> China First Submission, para. 284.

<sup>525</sup> ITC Report, Table V-3. Exhibit US-1.

<sup>526</sup> China First Submission, para. 286.

<sup>527</sup> ITC Report, Table C-1. Exhibit US-1.

<sup>528</sup> ITC Report, Table C-1. Exhibit US-1.

<sup>529</sup> ITC Report, Table C-1. Exhibit US-1.



even though the domestic industry's profitability improved in 2007, that improvement was not evidenced by the other indicia of the industry's condition.

276. Moreover, it is important to note that the improvement in the domestic industry's profitability in 2007 does not reflect any long-term strength. Rather, profits temporarily increased because the industry's raw material costs stabilized, and the domestic industry's average sales values increased as a result of the product mix shift to higher value tires that occurred when low-priced subject imports forced several domestic producers to reduce capacity. In 2008, however, the downward trend of profitability resumed. Subject imports continued to take market share from the domestic industry. The domestic industry suffered dramatic declines in production and shipments, and increases in the cost of raw materials returned to their previous levels. In sum, the data are fully consistent with the ITC's finding that the rising volume of subject imports from China displaced domestic sales, and this displacement led to declines in virtually all of the performance factors including profitability.

#### **(vi) Productivity**

277. China argues that trends in productivity do not correlate with imports from China.<sup>530</sup> This is not correct. Productivity, as measured in tires produced per man hour, declined from a period high of 2.9 in 2004 to 2.8 in 2005, to 2.6 in 2006, increased somewhat to 2.7 in 2007, then declined to a period low of 2.5 in 2008.<sup>531</sup> Like virtually all of the other performance indicators over the period, productivity declined as subject imports increased throughout the period.

278. China states that the increase in productivity from 2.6 in 2006 to 2.7 in 2007 confirms the absence of correlation. However, the trend in every other year-to year comparison over the period showed declines in productivity, and that overall productivity declined by 11.5 percent over the period.<sup>532</sup> Moreover, the slight improvement in the domestic industry's productivity level in 2007 left it still below the levels in 2004 and 2005.<sup>533</sup> In other words, the modest improvement in productivity in 2007 does not offset the fact that there was an overall decline in the industry's productivity that correlated with increasing import volumes over the period.

#### **(vii) Capacity**

279. China argues that neither capacity utilization nor plant closure data correlate with rapidly increasing imports, and that the ITC failed to adequately account for plant openings during the

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<sup>530</sup> China First Submission, para. 293.

<sup>531</sup> ITC Report, Table C-1. Exhibit US-1.

<sup>532</sup> ITC Report, Table C-1. Exhibit US-1.

<sup>533</sup> It is also not surprising that productivity would increase by 1.3 percent in 2007, considering that apparent consumption increased by 1.6 percent as the domestic industry reduced capacity by 8.8 percent that year and production workers by 6.4 percent that year. ITC Report, Table C-1. Exhibit US-1.

period, and improperly relied on data concerning increases in capacity in China.<sup>534</sup> China is again mistaken. We will address each of these issue is in turn.

(a) *Capacity Utilization*

280. China argues that the domestic industry's capacity utilization does not correlate with subject imports from China because capacity utilization increased in 2007. China disregards the fact that U.S. producers' capacity utilization trended downward throughout the period, and was lower in 2007 and 2008 than in either 2004 or 2005.<sup>535</sup> In fact, the domestic industry's capacity utilization was 10.3 percentage points lower in 2008 than in 2004.<sup>536</sup> Moreover, it is worth noting that the declines in the industry's capacity utilization occurred even though the industry reduced its capacity significantly throughout the period examined.

281. Moreover, the 2007 capacity utilization increase needs to be put in context. In 2007, the only year of the period that capacity utilization increased, the domestic industry suffered its largest capacity declines of the period.<sup>537</sup> As a result, the domestic industry was not actually producing more tires that year, instead, domestic production declined by 2.4 percent, even though apparent consumption increased by 1.6 percent that year.<sup>538</sup> In short, for one year, the rate of decline in capacity briefly outpaced the rate of decline in production so as to produce an artificial increase in capacity utilization. This is scarcely a sign of a healthy industry. Moreover, by 2008, as increasing volumes of subject imports reached their highest levels for the period, the domestic industry's capacity utilization rates resumed their downward trend, falling by 5.9 percentage points.<sup>539</sup>

(b) *Plant Closures*

282. China argues that the ITC's causation analysis incorrectly attributes plant closures during the period to subject imports.<sup>540</sup> China states that many of the plant closures were announced prior to 2007, before imports rose significantly in that year.<sup>541</sup> As the ITC noted, however, subject imports were rapidly increasing prior to these plant closures in 2007.<sup>542</sup> In this regard, the record

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<sup>534</sup> China First Submission, para. 295.

<sup>535</sup> ITC Report, Table C-1. Exhibit US-1.

<sup>536</sup> ITC Report, Table C-1. Exhibit US-1.

<sup>537</sup> ITC Report, Table C-1. Exhibit US-1.

<sup>538</sup> ITC Report, Table C-1. Exhibit US-1.

<sup>539</sup> ITC Report, Table C-1. Exhibit US-1.

<sup>540</sup> China First Submission, para. 298.

<sup>541</sup> China First Submission, para. 300.

<sup>542</sup> ITC Report, p. 26 & III-16, n.62. Exhibit US-1. China's assertion that China was not identified by name by the companies closing their plants, and that the plant closures were only attributed to low-cost imports, totally ignores the fact that China was by far and away the largest single country source of the low-priced imports.

of this proceeding showed that subject imports increased by 42.7 percent from 2004 to 2005 and by 29.9 percent from 2005 to 2006, even as apparent consumption declined in those years.<sup>543</sup> Moreover, from 2004 to 2005 subject imports gained 2.1 percentage points of market share, and an additional 2.4 percentage points from 2005 to 2006.<sup>544</sup> As the ITC determination recognizes, subject imports were already exhibiting a pattern of rapid increases prior to the announced closings of four plants.<sup>545</sup>

283. Moreover, the record also showed that all three domestic producers that closed plants during the period of investigation cited import competition as factor in their closings. As the ITC noted in its determination:

Bridgestone cited ‘fierce competition from low-cost producing countries’ as a factor in closing its Oklahoma City plant in 2006; Continental cited ‘global competition’ and ‘manufacturing costs [that] are cheaper overseas’ as contributing to the closure of its Charlotte, NC, plant in 2006; and for Goodyear, pressure from low-cost imports was cited as contributing to closure of its Tyler, TX, plant in 2008.<sup>546</sup>

284. This record evidence contradicted respondents’ argument that domestic producers voluntarily abandoned the lower-priced part of the U.S. tire market, and supported the ITC’s finding that a “more reasonable explanation for U.S. producers’ capacity reductions in 2006 and thereafter was a reaction to increases in subject imports from China that were already occurring and, given the size and degree of the increases, likely would continue in the future.”<sup>547</sup> China’s argument to the contrary has no merit.

*(c) Capacity Increases*

285. China states that the ITC ignored new plant openings and capacity increases that occurred during the period.<sup>548</sup> This statement is simply incorrect. The ITC directly addressed this issue in its opinion, and explained that declines in capacity caused by plant closings and capacity reduction over the period “was offset only in small part by the opening of a new, relatively small U.S. plant by Toyo in 2005 and expansions at several plants.”<sup>549</sup> As the ITC concluded, these

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This fact does not exonerate any individual source of low-cost imports, particularly the largest one.

<sup>543</sup> ITC Report, Table C-1. Exhibit US-1.

<sup>544</sup> ITC Report, Table C-1. Exhibit US-1.

<sup>545</sup> ITC Report, p. 26. Exhibit US-1.

<sup>546</sup> ITC Report, p. 26, n.147. Exhibit US-1.

<sup>547</sup> ITC Report, pp. 26-27. Exhibit US-1.

<sup>548</sup> China First Submission, para. 304.

<sup>549</sup> ITC Report, pp. 15-16. Exhibit US-1. The ITC specifically noted all of the expansions in capacity. *Id.* at p.16 n.75. Exhibit US-1.

relatively small capacity increases did not come close to offsetting the 17.8 percent decline in U.S. producers average annual capacity during the period, given that industry capacity fell from 226.8 million tires in 2004 to 186.4 million tires in 2008.<sup>550</sup> Nearly 75 percent of this decline (28.8 million tires) occurred in the last two years of the period examined, reflecting in large part the plant closures and capacity reductions noted in the ITC’s determination.<sup>551</sup>

(d) *Chinese Capacity*

286. Finally, China asserts that the ITC improperly pointed to growth in the capacity, production, and total shipments by Chinese producers of the subject tires to support its causation finding.<sup>552</sup> It claims that increases in capacity or shipments in the Chinese market were not remotely relevant to discerning whether imports from China, in fact, cause material injury to U.S. producers. The United States disagrees. The fact that the Chinese industry’s capacity, production, total shipments, and the share of total shipments sent to the U.S. market all grew over the period, is entirely relevant to this proceeding.<sup>553</sup>

287. It was clear that by 2005, domestic tire producers were faced with the prospect of competing against large and increasing volumes of low-priced subject imports. An article authored at the time expressly discussed the problem that growing Chinese production, capacity, and exports, were presenting to the U.S. industry, and noted that, even as of 2005, China had exported approximately 21 million tires to the United States.<sup>554</sup> This article described the overall effect on domestic supply in 2006 as “profound” and projected that it was likely to remain so as imports increase.<sup>555</sup> With respect to Chinese production and shipments of tires for the replacement market, the article noted that there was consensus that there would be rapid growth in the segment because of the growth of the Chinese industry.<sup>556</sup>

288. This contemporaneous view of the “profound” effect that the increasingly large industry in China had had, and would have on the U.S. tire market supports the ITC’s view that the subject imports were likely to increase as China continued to expand its capacity, production, and share of shipments to the United States. It is no wonder that domestic producers soon realized that they could not compete with the increasing volumes of low-priced subject imports in that market, and reacted by substantially reducing capacity and closing U.S. plants. As the ITC noted in its determination, the growth trends in the Chinese market further confirmed the role of

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<sup>550</sup> ITC Report, Table C-1. Exhibit US-1.

<sup>551</sup> ITC Report, p. 16. Exhibit US-1.

<sup>552</sup> China First Submission, para. 305.

<sup>553</sup> It is interesting note that the annual increases in capacity, production, and shipments in the Chinese market are exactly the opposite of the trends the domestic industry was experiencing in the U.S. market.

<sup>554</sup> ITC Report, p. 27 n.150. Exhibits US-1, US-18.

<sup>555</sup> ITC Report, p. 27 n.150. Exhibits US-1, US-18.

<sup>556</sup> ITC Report, p. 27 n.150.

increasing imports in the diminished performance of the U.S. industry, and further contradicted respondents' theory that domestic producers voluntarily abandoned the low-priced segment of the U.S. market.<sup>557</sup>

### (viii) Employment

289. Although China acknowledges that certain employment indices declined consistently over the period, it claims that the ITC incorrectly inferred causation from them because these declines were largely due to restructuring measures that were not caused by subject imports from China.<sup>558</sup> The ITC's discussion of employment factors in its determination establishes China's claims to the contrary are unfounded. The ITC stated:

U.S. employment as measured by the number of U.S. production and related workers (PRWs) declined in each year during the period examined, as did the number of hours worked. Both were at their lowest levels of the period in 2008. U.S. producers' productivity fluctuated, but was also at its lowest level in 2008. The number of U.S. PRWs declined by 14.2 percent from 36,411 in 2004 to 31,243 in 2008. The largest one-year decline occurred in 2007, reflecting the closing of three plants in 2006; however, the number of PRWs continued to fall in 2008. Hours worked by PRWs similarly fell each year during the period examined and by 17.0 percent between 2004 and 2008. The largest one-year decline occurred between 2007 and 2008, when the number of hours worked fell by 6.1 percent. Total wages paid declined in each year during the period examined, and, although hourly wages increased through 2006, they fell in 2007 and remained below the 2006 level in 2008.<sup>559</sup>

290. Confronted with the fact that there was a clear correlation between the deterioration in all employment factors and the increase in subject import volumes every year, China states that most of the declines in production workers were caused by the plant closings, and claim "there is no evidence that any of these closures were caused by subject imports from China."<sup>560</sup> As we have

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<sup>557</sup> ITC Report, pp. 24-25.

<sup>558</sup> China First Submission, para. 313.

<sup>559</sup> ITC Report, pp. 16-17. Exhibit US-1.

<sup>560</sup> China First Submission, para. 317. China also claims that although total hours worked declined in the period, hours worked per PRW jumped from 2,049 to 2,109 between 2006 and 2007, indicating more efficient labor utilization to accommodate expanded production. China First Submission, para. 315. China's theory has a number of problems, including the facts that (1) domestic production actually declined that year, (2) the domestic industry's PRWs dropped by 6.4 percent that year, its largest annual decline of the period so one would expect the remaining PRWs' hours to increase, (3) hours worked per PRW fell the very next year, and (4) hourly wages actually declined in 2007. ITC Report, Table C-1. Exhibit US-1. In other words, by 2007, a reduced workforce was expected to work longer hours and for less pay in order to compete with increasing volumes of low-priced subject imports that

previously pointed out, however, the ITC had a firm basis for finding that these closures were caused in significant part by subject imports.<sup>561</sup>

**(ix) Capital Expenditures and R&D Expenditures**

291. The ITC also examined capital expenditures and R&D expenditures. The ITC did not rely on these factors to establish that there a causal link between subject imports and the industry's condition. Instead, it noted that U.S. producers' R&D expenses and capital expenditures fluctuated within relatively narrow ranges during the period examined, and both trended upwards as the domestic producers sought to modernize their facilities and increase efficiency.<sup>562</sup> It is not surprising, however, that these two factors would trend upwards as the domestic industry was forced to focus on premium, higher-end production of tires after significant and increasing undersold subject imports from China greatly displaced U.S. producers in the lower-end segment of the market.

**3. The ITC Considered Other Factors Allegedly Causing Injury to the Industry and Concluded That They Did Not Sever the Causal Link Between the Subject Imports and Material Injury**

292. As part of its analysis of the causal link between rapidly increasing imports and material injury, the ITC also considered and addressed other factors allegedly caused material injury to the industry, and found that these other factors did not break the clear causal link between increasing imports from China and the material injury to the industry.<sup>563</sup> When addressing these issues, the ITC fully satisfied U.S. obligations under the Protocol.

293. China alleges that the ITC failed to comply with its obligations to address these other factors fully. China is mistaken. Its arguments are legally mistaken because China is, once again, seeking to import into the Protocol analytical standards by the Appellate Body under the Safeguards Agreement, which have no basis in the text of the Protocol. Its arguments are also misplaced because, despite China's assertions to the contrary, the ITC did address the significant other factors that China now claims were responsible for the industry's injury.

294. We discuss these issues below.

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continued to take market share from the domestic industry in ever year of the period examined.

<sup>561</sup> ITC Report, pp. 26-27

<sup>562</sup> ITC Report, pp. 17-18. Exhibit US-1. One of the smaller-volume U.S. producers, Toyo, accounted for a relatively large share of cumulative capital expenditures as the result of its establishment and subsequent expansion of a greenfield manufacturing facility. ITC Report, III-20. Exhibit US-1.

<sup>563</sup> ITC Report, pp. 20-22, 24-25, 26-27, 28 & 29. Exhibit US-1.

**a. The Protocol Does Not Require the ITC to Perform the Same “Non-Attribution” Analysis Required Under Article 4.2 of the Safeguards Agreement, as China Claims**

295. In its submission, China asserts that the ITC failed to adequately consider and address certain other factors, including demand declines, the industry’s business strategy, and the impact of increasing costs, among other things, when assessing whether the subject imports were causing material injury to the U.S. industry.<sup>564</sup> Under the Protocol, China claims, the ITC could not possibly determine that increasing imports from China were a significant cause of material injury without first analyzing the “role played by causes other than subject imports.”<sup>565</sup>

296. According to China, the Appellate Body has made clear that, “[i]n a situation where several factors are causing injury ‘at the same time,’ a final determination about the injurious effects caused by increased imports can only be made if the injurious effects caused by all the different causal factors are distinguished and separated.”<sup>566</sup> In China’s view, before a competent authority can establish the requisite “causal link” between imports and material injury, the authority must perform the same non-attribution analysis for other factors in the market that it would in a global safeguard proceeding.<sup>567</sup>

297. Once again, China’s argument disregards the actual text of the Protocol, and the context and scope of the Appellate Body’s findings under the Safeguards Agreement. First, unlike the Safeguards Agreement,<sup>568</sup> the Protocol does not specifically require a competent authority to consider the possible effects of other factors causing material injury or threat of material injury as part of its causation analysis. Nor does it instruct the competent authority to ensure it does not attribute the effects of such other factors to the subject imports.<sup>569</sup>

298. Instead, the competent authority is required only to assess whether increasing imports are a significant cause of material injury or threat of material injury to the industry, and to consider the “volume of imports,” their “effect . . . on prices for like or directly competitive articles, and the effect of such imports on the domestic industry” producing such articles in that analysis.<sup>570</sup> Given the absence of any language in the Protocol requiring the competent authority to consider and then “separate and distinguish” other factors causing injury as part of its causation analysis,

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<sup>564</sup> China First Submission, paras. 326-358.

<sup>565</sup> China First Submission, para. 327.

<sup>566</sup> China’s First Submission, para. 328 (*citing US - Lamb Meat (AB)*, para. 179).

<sup>567</sup> China’s First Submission, para. 327.

<sup>568</sup> Safeguards Agreement, Article 4.2(b)(second sentence).

<sup>569</sup> *See generally* Protocol of Accession, paragraph 16.

<sup>570</sup> Protocol of Accession, paragraph 16.4.

China has no textual basis for claiming that the Protocol requires a competent authority to perform such an analysis.<sup>571</sup>

299. Given the lack of explicit instruction on this issue in the Protocol, a competent authority may use any reasonable methodology to consider such other factors when assessing whether market disruption exists.<sup>572</sup> Accordingly, a competent authority's need to address the effects of other possibly injurious factors will depend on the facts and circumstances of the particular case. In some cases, an other factor might arguably be so significant a cause of injury to the industry that the competent authority will need to perform a detailed and reasoned explanation of the effects of that factor. In other cases, the factor may be contributing to injury in a considerably less significant fashion. In those circumstances, the competent authority could reasonably reference the factor and indicate in a reasonable fashion why the factor does not explain the injury caused to the pertinent industry. In still other cases, the authority could simply find that there was no evidence establishing that a particular factor caused injury to the industry, or that the parties have not presented sufficient evidence to establish that the factor causes any injury at all. In such cases, the authority would have little or nothing to investigate and no need to analyze the effects of the factor.<sup>573</sup>

300. China asserts that the Appellate Body's decision in *US - Lamb Meat (AB)* is to the contrary.<sup>574</sup> According to China, in *US - Lamb Meat (AB)*, the Appellate Body determined that a detailed analysis of the injurious effects of non-import factors was required by the "causal link" requirement of the Safeguards Agreement.<sup>575</sup> China's interpretation of the scope of this decision is mistaken.

301. In its report in *US - Lamb Meat (AB)*, the Appellate Body stated that, when "several factors are causing injury 'at the same time,' a final determination about the injurious effects caused by imports can only be made if the injurious effects caused by all the different causal factors are distinguished and separated."<sup>576</sup> The Appellate Body grounded this statement,

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<sup>571</sup> Further, given the absence of language requiring such an analysis, China has no basis for its claim that the "object and purpose" of paragraph 16 of the Protocol of Accession require analysis of such factors. There is no language in the text of the Protocol or the Report of the Working Party on the Protocol to indicate that an analysis of other factors is required under the Protocol of Accession.

<sup>572</sup> See *EC - Pipe Fittings (AB)*, para. 189 (in context of Antidumping Agreement; as long as an investigating authority complies with the specific requirements of the Agreement, "it is free to choose the methodology it will use in examining the 'causal relationship' between dumped imports and injury"); *US - Hot-Rolled Steel (AB)*, para. 224 (same).

<sup>573</sup> Under the Antidumping Agreement and the Subsidies Agreement, for example, an investigating authority is required only to consider other "known" factors causing injury to the industry. Antidumping Agreement, para. 3.5; Subsidies Agreement, para. 15.5.

<sup>574</sup> China First Submission, para. 328.

<sup>575</sup> China First Submission, paras. 328-29.

<sup>576</sup> China First Submission, para. 328 (citing *US - Lamb Meat (AB)*, para. 179).



however, on the express language of Article 4.2(b) of the Safeguards Agreement, which requires an authority to ensure that it does not attribute to imports the injury caused by other factors harming the industry.<sup>577</sup> As we have previously pointed out, the text of the Protocol contains no similar non-attribution requirement.<sup>578</sup> Given the lack of such a requirement in the Protocol, there is no basis for China’s assertion that the Appellate Body’s statement in *US - Lamb Meat (AB)* suggests that the ITC must provide a more detailed analysis of the injurious effects of other factors in the market than it did.

302. Moreover, it is not of minor import, as China suggests,<sup>579</sup> that the Protocol lacks language requiring a competent authority to address and analyze the injurious effect of other factors. It is well-established that, under the principle of *inclusio unius est exclusio alterius*, when a treaty includes a term or requirement in one part but excludes that term or requirement from another part, the absence of that term or requirement indicates that the drafters intentionally chose not to include that term or requirement in the provision from which it is absent.<sup>580</sup> And here, although the negotiators of the Protocol were presumably aware of that the Safeguard Agreement contained “non-attribution” language, they did not include similar “non-attribution” language in the causation provisions of the Protocol. In other words, the absence of such language indicates that a competent authority is not required to perform the type of “non-attribution” analysis contemplated by China here.

303. China alleges that the Protocol’s use of the phrase “significant cause” implies that a competent authority must perform a “relational assessment” of all causes of injury to an industry before it can conclude that the subject imports were a “significant cause” of material injury to the industry.<sup>581</sup> There are two problems with this analysis. First, if it were true that a “causal link” requires such a “relational assessment,” as China contends, then there would have been no need

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<sup>577</sup> *US - Lamb Meat (AB)*, paras. 162-181. Article 4.2(b) of the Safeguards Agreements provides that, “[w]hen factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports.” Moreover, under the Antidumping Agreement, the Appellate Body has found a similar “non-attribution” analysis on an investigating authority with respect to the possible effects of other factors, in that case relying on the language of Article 3.5 of the Antidumping Agreements, which directs an investigating authority to “examine any known factors” that are causing injury to the industry and ensure that it does not attribute such effects to the subject imports. *US - Hot-Rolled (AB)*, paras. 216-236.

<sup>578</sup> Protocol of Accession, para. 16.

<sup>579</sup> China First Submission, para. 329.

<sup>580</sup> *China - Publications and Audiovisual Products (Panel)*, para. 7.60 n.103; para. 7.81 n.124.

We would note that this is the classic situation in which the doctrine of *inclusio unius est exclusio alterius* would apply, that is, a reviewing panel should not on its own import an affirmative requirement from one section of a treaty into another in the absence of an indication that such an interpretation is intended. This does not mean that a competent authority would be prohibited from performing a non-attribution or similar analysis under the Protocol; it only means that it is not required to do so. See *US - Hot-Rolled Steel (AB)*, para. 171. Indeed, although the ITC is not required to conduct the type of non-attribution analysis that would be required under the Safeguards Agreement, it would not be prohibited from analyzing the effects of these factors as necessary, which is what the ITC did here.

<sup>581</sup> China First Written Submission, para. 330.

for the negotiators of the Safeguards Agreement to include specific “non-attribution” language in Article 4.2(b) of that Agreement. Given that the negotiators of the Safeguards Agreement believed that it was necessary to include specific language requiring a “non-attribution” analysis, this suggests that such a requirement is not inherently included in the “causal link” requirements of those agreements. There is, therefore, no basis for China’s argument under the “significant cause” language of the Protocol.

304. Finally, it is not true, as China asserts, that the ITC “apparently refused to investigate alternative causes,” or that “[it] barely acknowledged” them in its analysis.<sup>582</sup> As discussed below, the ITC investigated, considered, and analyzed all of the factors that could reasonably be considered significant enough to break the causal link between imports and material injury. Indeed, the ITC directly considered and addressed in its analysis the industry’s alleged “business strategy” of shifting their U.S. production away from low-end tires to high-end products and declines in demand in the U.S. tires market over the period, which are the two main factors cited by China as breaking the causal link between imports and injury.<sup>583</sup> The ITC addressed these factors and reasonably concluded that they did not indicate that subject imports were not a significant cause of material injury to the industry.<sup>584</sup>

305. The ITC also specifically considered other alleged causes of injury, such as increases in the industry’s raw material and other costs, changes in its productivity levels, changes in the levels of non-subject imports, and the impact of rising gas prices on demand, and found that they too did not indicate that the subject imports from China were not a significant cause of material injury to the industry.<sup>585</sup> The ITC’s analysis was both reasoned and consistent with the record and was fully in accordance with the requirements of the Protocol.

**b. The ITC Reasonably Concluded That Other Factors Do Not Detract From the Significance of Rapidly Increasing Imports From China**

**i. The ITC Considered Whether the Industry’s “Business Strategy” Was the Cause of Its Injury**

306. In the first of its two main arguments on this issue, China asserts that the ITC failed to consider whether the U.S. industry adopted a “business strategy” of shifting their U.S. production to higher-value products in the market to lower-end tires from China, and began to supply demand for these tires as a result of this strategy.<sup>586</sup> China contends that these changes in the

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<sup>582</sup> China First Submission, paras. 326 and 331.

<sup>583</sup> China First Written Submission, paras. 332-355.

<sup>584</sup> *E.g.*, ITC Report, pp. 22 & 26. Exhibit US-1.

<sup>585</sup> ITC Report, pp. 22, 24, & 29. Exhibit US-1.

<sup>586</sup> China First Submission, paras. 344-355.

industry's operations were a "positive" development for the industry. China asserts that the ITC simply "brushed [this issue] aside" in its analysis,<sup>587</sup> and that it incorrectly attributed the industry's actions to the adverse effects of low-priced imports from China.<sup>588</sup> China's claims are misplaced.

307. The ITC examined China's argument in detail and rejected it.<sup>589</sup> After noting that several parties had argued that the "domestic producers voluntarily abandoned the lower-priced part of the U.S. tire market and that the subject imports simply filled the void left by their departure," the ITC stated that it disagreed.<sup>590</sup> The ITC explained that the record showed that imports of tires from China were rapidly increasing before Bridgestone, Continental, and Goodyear announced the closing of plants in 2006 and 2008.<sup>591</sup> Moreover, the ITC explained that these "three companies confirmed in statements issued at the time of the announcements [of the closings] that low-price competition from Asia, including China," was an important factor in the decisions.<sup>592</sup> Specifically, Bridgestone stated that "fierce competition from low-cost producing countries" was a factor in its decision to close its Oklahoma City, Oklahoma plant in 2006, Goodyear stated that a contributing factor in its decision to close its Tyler, Texas plant in 2008 was due to "pressure from low-cost imports," and Continental stated that it closed its Charlotte, North Carolina plant in 2006 due to "global competition" and cheaper manufacturing costs overseas.<sup>593</sup>

308. Given these facts, it was entirely reasonable for the ITC to take these producers at their word when they explained why they shut down these facilities, especially since imports from China undersold domestic producers throughout the period and entered the market in rapidly increasing volumes from the very beginning of the period. As the producers stated, the decision to close those facilities was not a voluntary decision that was made independently of imports. It was, instead, a direct response to the growing presence in the market of low-cost imports, including Chinese imports, from the very beginning of the period.<sup>594</sup> The record was hardly

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<sup>587</sup> China First Submission, para. 355.

<sup>588</sup> China First Submission, paras. 344-355.

<sup>589</sup> ITC Report, p. 26. Exhibit US-1.

<sup>590</sup> ITC Report, p. 26. Exhibit US-1.

<sup>591</sup> ITC Report, p. 26 & Table C-1. Exhibit US-1. In particular, as the ITC noted, the record showed that the total quantity of the subject imports had increased by 42.7 percent between 2004 and 2005, by an additional 29.9 percent by 2006, and by an additional 53.7 percent in 2007. ITC Report, p. 26, n.146. Exhibit US-1.

<sup>592</sup> ITC Report, p. 26 and III-16, n. 62. Exhibit US-1.

<sup>593</sup> ITC Report, p. 26, n. 147. Exhibit US-1.

<sup>594</sup> ITC Report, p. 26. Exhibit US-1. There is no basis for China's assertion that the ITC "rejected" the testimony of the U.S. producers that these closures were not related to the influx of Chinese imports. China First Submission, paras. 350-351. In its submission, China points to no actual statements to support this claim but instead to statements from the three producers who closed these facilities. The ITC considered these statements and found that they were outweighed by the fact that the producers themselves stated, at the time of the closings, that they were due, in significant part, to competition from low-priced imports. ITC Report, p. 26, n. 147, and p. III-16, n. 62. Exhibit US-1.

“bereft of evidence that imports from China caused the closure of any factories during the period,” as China now argues.<sup>595</sup>

309. Moreover, the ITC reasonably relied on contemporaneous press reports that indicated market participants were well aware there had been, and was likely to be, a tremendous continuing growth in the size of the Chinese tires industry and in the volume of its exports to the United States.<sup>596</sup> For example, an industry periodical reported in March 2006 that China had exported an estimated 21 million tires to the United States in 2005. That periodical stated that the “overall effect [of Chinese imports] on domestic supply [had been] ‘profound.’”<sup>597</sup> The article predicted that the impact of China on the market was “likely to remain so as imports increase.”<sup>598</sup> Given that this industry publication stated that, even in 2005, the growth of Chinese imports had already had a “profound” effect on supply in the market,<sup>599</sup> the U.S. industry was both likely to be well aware of this fact and to make capacity and production decisions in response to it, as the ITC concluded.

310. Similarly, an industry publication reported in 2008 that “it is difficult to comprehend the level of tire activity in China,” especially since “sales of tire manufacturing equipment into China have dominated the last ten years of machinery sales.”<sup>600</sup> The article explained that the “influx” of tire manufacturing equipment into China during the prior ten years had made China the most significant purchaser of such equipment in the world.<sup>601</sup> The article also noted that the “influx” of equipment had “‘lifted the number of Chinese tire makers from a few dozen to over 200,” which “compares with around 400 factories in the rest of the world today.”<sup>602</sup> The article further noted that “‘many of these new Chinese factories are equipped with modern equipment and have the technology to make tires suited for export around the world.’”<sup>603</sup>

311. Again, this industry publication established that market participants were well aware of the extraordinary growth in the size and export capacity of the Chinese industry before and during the period of investigation. Given this, the ITC reasonably relied on this article as

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<sup>595</sup> China First Submission, para. 351.

<sup>596</sup> ITC Report, pp. 26-27, nn. 148 & 150. Exhibit US-1.

<sup>597</sup> ITC Report, p. 27, n. 150. Exhibit US-1.

<sup>598</sup> ITC Report, p. 27, n. 150. Exhibit US-1.

<sup>599</sup> Given this statement, it is clear that China is understating the impact of the Chinese imports on the market when it says that “it is difficult to believe that imports from China – out of all the tires being sold in the global market – could have forced the producers to carry out the major shift to higher-end product that occurred in the United States.” China First Submission, para. 352. Even in 2006, this news article indicates, the impact of the Chinese imports on supply in the U.S. market was considered “profound.” ITC Report, p. 27, n. 150. Exhibit US-1.

<sup>600</sup> ITC Report, p. 26, n. 148. Exhibit US-1, US-19.

<sup>601</sup> ITC Report, p. 26, n. 148. Exhibit US-1, US-19.

<sup>602</sup> ITC Report, p. 26 & n. 148. Exhibit US-1, US-19.

<sup>603</sup> ITC Report, p. 26 & n. 148. Exhibit US-1, US-19.

evidence that U.S. producers had closed certain production facilities as a strategy to deal with the rapid growth in the size and aggressiveness of the Chinese industry and the rapid increase in its exports to the United States.<sup>604</sup>

312. The ITC also reasonably relied on the fact that the U.S. producers were not the largest importers of the subject imports. As the ITC pointed out, the record established that U.S. producers were responsible for only a relatively small portion of the increasing Chinese imports during the period, importing only 23.5 percent of Chinese imports in 2008.<sup>605</sup> Because U.S. producers were not the primary importers of the subject imports, they were also not responsible for the large bulk of the increase in Chinese imports over the period. In this regard, the record showed that 84.2 percent of the growth in subject imports over the period of investigation was imported by companies other than U.S. producers.<sup>606</sup> It was clearly reasonable for the ITC to conclude that this indicated that the industry’s alleged “voluntary business strategy” was not itself responsible for the tremendous growth in the subject imports during the period.<sup>607</sup> As the ITC stated, it was instead the aggressive pricing strategy of the Chinese exporters and importers that caused the influx of subject imports.

313. China also argues that the ITC failed to recognize that the U.S. producers are, like all tire producers, “global companies with global sourcing strategies” who rationally chose to shift their low-end production to China in order to “enhance [their] profitability.”<sup>608</sup> There are several problems with this theory. First, the industry’s decision to import tires from China did not “enhance[] the industry’s profitability,” as China claims. Instead, the record shows that, as the industry imported more of the subject imports during the period, its profitability levels declined significantly.<sup>609</sup> For example, in 2005, the quantity of subject tires imported by the U.S. industry increased by 48.8 percent, but the industry’s operating margin fell by 0.9 percentage points. Similarly, in 2006, the industry’s imports of the subject tires increased by an additional 27.8 percent, but its operating margin fell by 2.6 percentage points. Ultimately, in 2008, the industry imported its highest level of subject imports but saw its operating income fall to its lowest level of the period in 2008.<sup>610</sup> Given these trends, and the fact that the industry’s production quantities, sales quantities, and market share were all declining during this period, it can hardly

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<sup>604</sup> ITC Report, pp. 26-27. Exhibit US-1.

<sup>605</sup> ITC Report, p. 26. Exhibit US-1.

<sup>606</sup> ITC Report, Table II-3. Exhibit US-1.

<sup>607</sup> ITC Report, p. 26. Exhibit US-1.

<sup>608</sup> China First Submission, para. 348, 345-349.

<sup>609</sup> Compare ITC Report Table II-3 with Table C-1. Exhibit US-1.

<sup>610</sup> Compare ITC Report Table II-3 with Table C-1. Exhibit US-1.

be said that the decision to import more subject tires was a “positive” one for the industry, as China asserts.<sup>611</sup>

314. China’s theory of “global benefit” is also flawed because the Protocol directs a competent authority to examine whether the subject imports from China are causing or threatening to cause market disruption to the “domestic producers of like or directly competitive products.”<sup>612</sup> It is reasonable for a competent authority to focus, as the ITC did, on whether the subject imports are harming the industry’s “production” operations within the Member’s territory rather than on the effect on overall global import and export operations of the industry’s multi-national affiliates.

315. Finally, China’s “global companies” theory ignores that subject imports are not necessarily made non-injurious simply because they were imported by one member of a domestic industry. Assuming, *arguendo*, that a producer closed domestic production and switched to imports to enhance its own profitability, those imports could still have a significant adverse impact on the prices, market share, and production and sales volumes of other members of the industry. In other words, imports of subject producers from China would not be less injurious to an industry because they are being imported by a member of the industry. Indeed, as explained above, those imports may be an effect of market disruption caused to the producer by previous imports. China’s “global companies” theory ignores all of these concerns.

**ii. The ITC Also Reasonably Concluded That Declining Demand Did Not Sever the Causal Link Between Imports and Injury**

316. In the second of its two main arguments concerning the ITC’s alleged failure to address other factors causing injury to the industry, China claims that the ITC failed to consider “important changes in demand for tires in the United States.”<sup>613</sup> According to China, the ITC “barely acknowledged” changes in demand during the period of investigation, including demand changes in the OEM market, and “gave particularly short shrift to the impact of the recession in 2008” on the industry’s condition.<sup>614</sup> China posits that it is inadequate under the Protocol to “barely acknowledg[e] a factor,” and claims that the ITC’s entire analysis of the demand issue consisted of the statement that it had no obligation to weigh causes under the statute.<sup>615</sup> Once again, China is mistaken.

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<sup>611</sup> ITC Report at Table C-1. In fact, even if one adds the industry’s imports of subject tires to its domestic shipments during the period, the industry’s market share is still considerably lower than it was at the beginning of the period. Compare ITC Report Table C-1 with Table II-3. Exhibit US-1.

<sup>612</sup> Protocol of Accession, para. 16.1.

<sup>613</sup> China First Submission, para. 332.

<sup>614</sup> China First Submission, para. 340.

<sup>615</sup> China First Submission, para. 341.

317. Despite China’s claim’s, the ITC fully addressed the significant demand trends in the market, including those in the OEM market, and analyzed why the recession in 2008 did not break the causal link between the subject imports and injury.<sup>616</sup> In its analysis, for example, the ITC explained that “demand trends for subject tires depend on changes in the number of new passenger vehicles and light trucks produced in the United States, the number of existing passenger vehicles and light trucks that need replacement tires, and the total number of miles driven.”<sup>617</sup> In its report, moreover, it expressly stated that apparent consumption of tires in the U.S. market declined throughout the period.<sup>618</sup>

318. In the course of that analysis, the ITC also considered the possibility that the recession in 2008 had affected the link between the increased imports and injury, and concluded that it had not broken that causal link.<sup>619</sup> Specifically, in its analysis, the ITC examined the impact of the recession in 2008 on the increasing volumes of the subject imports, and on the volumes trends for the U.S. industry and non-subject imports.<sup>620</sup> It found that, “even in 2008 when U.S. apparent consumption was falling,” the record showed that the subject “imports continued to increase rapidly.”<sup>621</sup> Specifically, the ITC stated, “subject imports increased by 4.5 million tires in 2008, while U.S. consumption declined by 20.4 million tires.”<sup>622</sup> In contrast, the ITC pointed out, the quantities of U.S. tires and those of non-subject imports declined during 2008, with imports from third countries falling at roughly the same pace as the decline in consumption, and U.S. production falling by 11.1 percent, a pace that was significantly faster than the 6.9 percent decline in consumption in that year.<sup>623</sup> Given these trends in 2008, the ITC reasonably rejected the claims of Chinese respondents that the recession in 2008 explained all or most of the declines in the industry’s production and shipment levels during that year.<sup>624</sup> Accordingly, the ITC also reasonably concluded that the recession did not indicate that the subject imports were not a significant cause of material injury to the industry.<sup>625</sup>

319. Furthermore, the record also showed that demand declines during the rest of the period of investigation did not explain the significant declines in the industry’s production, sales and

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<sup>616</sup> ITC Report, pp. 22 & 26. Exhibit US-1.

<sup>617</sup> ITC Report, p. 22. Exhibit US-1.

<sup>618</sup> ITC Report, p. 32. Exhibit US-1.

<sup>619</sup> ITC Report, p. 26. Exhibit US-1.

<sup>620</sup> ITC Report, p. 26. Exhibit US-1.

<sup>621</sup> ITC Report, p. 26. Exhibit US-1.

<sup>622</sup> ITC Report, p. 26. Exhibit US-1.

<sup>623</sup> ITC Report, p. 26. Exhibit US-1.

<sup>624</sup> ITC Report, pp. 26 & 29. Exhibit US-1.

<sup>625</sup> ITC Report, p. 29. Exhibit US-1.

market share levels over the period of investigation.<sup>626</sup> As can be seen from the table below, the record of the ITC investigation established that, even during periods of demand declines in the investigation, the subject imports from China continued increasing at a rapid rate while the production, shipment and net sales quantity levels of the U.S. industry fell at a much more rapid rate than the declines in demand.<sup>627</sup>

Period	2004-05	2005-06	2006-07	2007-08
Percentage Change in Consumption	-0.8	-4.4	+1.6	-6.9
Percentage Change in U.S. Industry Production	-4.8	-11	-2.4	-11.1
Percentage Change in U.S. Industry U.S. Shipments	-6.7	-9.9	-5	-12.1
Percentage Change in U.S. Industry Net Sales Quantity	-5.7	-8.9	-5.5	-11.7
Percentage Change in Imports from China	+42.7	+29.9	+53.7	+10.8

Source: ITC Report, Table C-1. Exhibit US-1

Given this, it was reasonable for the ITC to conclude that the record evidence on demand declines over the period did not undermine the evidence establishing that increasing imports from China were a significant cause of material injury to the industry.<sup>628</sup>

320. Moreover, it is not true, as China asserts,<sup>629</sup> that the ITC failed to consider demand trends in the OEM market and how they affected domestic production and sales volumes during the period of investigation.<sup>630</sup> In its analysis, the ITC stated that importers of subject tires and U.S. producers sold their products into the replacement and OEM markets, but added that the

<sup>626</sup> We would note that, before the ITC, the Chinese respondents' primary argument about demand declines in the overall market was that the recession of 2008 had a significant impact on the declines in the industry's production and sales levels in that year. ITC report, p. 20 & n. 107. Exhibit US-1. The respondents did not make much of the overall declines in demand during the period in their briefs. *Id.*

<sup>627</sup> The data in the chart is contained ITC Report, Table C-1. Exhibit US-1.

<sup>628</sup> ITC Report, p. 29. Exhibit US-1.

<sup>629</sup> China First Submission, paras. 333 & 337-340.

<sup>630</sup> ITC Report, pp. 21-22. Exhibit US-1.



“replacement market [was] by far the more important market for both groups of producers in terms of the volume of sales. . . .”<sup>631</sup> For example, the ITC found that the large majority of U.S. producers’ shipments in 2008, 82.3 percent, went to the replacement market.<sup>632</sup> The ITC noted that the replacement market was “relatively more important” for the Chinese products, with 95.0 percent of imports from China being sold to the replacement market in 2008.<sup>633</sup> However, as the ITC also explained, the record also showed that, despite declines in demand in the OEM market over the period of investigation, the subject imports were increasing their shipment levels and their market share in the OEM sector, just as they were in the overall tires market.<sup>634</sup> China’s argument that the U.S. ignored or failed to analyze these trends are just as unfounded as their other arguments.

321. Finally, China argues that the demand declines in the market explain in full the declines in the industry’s production and sales levels over the period, stating “there [was] almost a one-to-one correspondence between the decline in the overall U.S. market and the decline in U.S. domestic shipments.”<sup>635</sup> China’s argument incorrectly assumes that the U.S. industry should itself absorb all of the declines in demand that occurred. This is, of course, not a reasonable assumption. All other things being equal, a decline in demand should have comparable effects on all sources of supply, domestic and import. The fact that domestic producers bore a one-to-one drop in production, while the quantities and market share of the subject imports increased demonstrates that some other factor – which the ITC identified as low-priced rapidly increasing imports from China – was a significant cause of the drop in domestic producers’ production.

322. In sum, the ITC did consider and analyze demand declines in the overall market and the OEM sector of the market. After analyzing these declines, it reasonably found that these demand declines did not explain why the industry’s production and sales volumes were declining so significantly during the period of investigation.<sup>636</sup> As a result, it reasonably found that they did not break the causal link between subject imports and material injury.<sup>637</sup>

**iii. The ITC Also Reasonably Concluded That Other Causes of Injury Did Not Sever the Link Between Imports and Injury**

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<sup>631</sup> ITC Report, p. 21. Exhibit US-1.

<sup>632</sup> ITC Report, p. 21. Exhibit US-1.

<sup>633</sup> ITC Report, p. 21. Exhibit US-1.

<sup>634</sup> ITC Report, p. 21 and Table V-3. Exhibit US-1. Shipment of the subject imports into the OEM sector increased considerably over the period, increasing from 121,000 tires in 2004 to 2.3 million tires in 2000. ITC Report at Table V-3.

<sup>635</sup> China’s First Written Submission, para. 341.

<sup>636</sup> ITC Report, pp. 21-22 & 26. Exhibit US-1.

<sup>637</sup> ITC Report, p. 29. Exhibit US-1.

323. In its submission, China also argues that the ITC “neglected several other alternative causal factors noted by respondents” during the ITC investigation, including “sharp increases in raw material costs and raw material shortages; automation for increased productivity; higher gasoline prices resulting in less driving; strikes and labor actions; U.S. tire producers’ high legacy costs; and other factors such as equipment restraints.”<sup>638</sup> China has not, however, offered evidence to support its claim that these factors were causes of material injury to the industry during the period, nor has it explained why they are significant enough to break the causal link between the subject imports and injury. Instead, China simply asserts that the “USITC essentially listed and then dismissed these factors, without a reasoned and adequate explanation” of them.<sup>639</sup>

324. China’s argument relating to these purported alternative causes is legally insufficient. Under the WTO Agreements, a complainant bears the burden of presenting evidence and argument sufficient to establish a presumption that the measure being challenged is inconsistent with a Member’s WTO obligations.<sup>640</sup> China has failed to carry this burden. In its submission, it has not explained why any of these factors was actually a cause of injury to the industry, nor has it explained why these factors break the existence of a causal link between the subject imports and injury to the industry. By failing to substantiate its argument in its first submission, China has failed to bear its burden to establish that the ITC has not satisfied its obligations under the Protocol.

325. Moreover, China is also wrong when it asserts that the ITC failed to address any of these factors in its analysis. For example, China cites the existence of “sharp increases in raw materials costs” as one factor that the ITC supposedly ignored.<sup>641</sup> However, the ITC clearly considered and discussed in detail the effect that increases in raw materials pricing had on the industry during the period.<sup>642</sup> The ITC specifically noted that the industry’s ratio of cost of goods sold to net sales increased considerably over the period, and that this increase was attributable, in part, to “an increase in the cost of raw materials, which was mostly due to the rapid increase in the price of petroleum product inputs in synthetic rubber.”<sup>643</sup> After noting that this increase affected the industry’s cost structure, the ITC found that the presence of the growing levels of lower-priced subject imports prevented the U.S. producers from passing these “increasing raw materials costs on to their customers,” which led to a decline in the industry’s operating margins over the period of investigation.<sup>644</sup> Contrary to what China alleges, the ITC did not simply “dismiss” this issue without discussion. Instead, it clearly considered the impact

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<sup>638</sup> China First Submission, para. 356.

<sup>639</sup> China First Submission, para. 356.

<sup>640</sup> *US – Shirts and Blouses (AB)*, pp. 14-15.

<sup>641</sup> China First Submission, para. 356.

<sup>642</sup> ITC Report, p. 24. Exhibit US-1.

<sup>643</sup> ITC Report, p. 24. Exhibit US-1.

<sup>644</sup> ITC Report, p. 24. Exhibit US-1.

of raw materials costs on the industry, and also reasonably explained that the increases in costs exacerbated the effects of the aggressive underselling by subject imports during the period.<sup>645</sup>

326. Similarly, China mistakenly claims that the ITC failed to discuss the fact that “higher gasoline prices result[ed] in less driving” during the period.<sup>646</sup> The ITC specifically acknowledged this factor in its analysis, stating that “demand for replacement tires fell in 2008 as the number of miles driven decreased, consumers tried to get more miles from current tires, and the economy weakened.”<sup>647</sup> As we explained above, however, the ITC found that the declines in demand resulting from these factors did not break the causal link between the subject imports and injury, given that declines in the industry’s production, shipment and sales levels fell at a much sharper rate than demand due to the growth in imports during these periods of demand declines.

327. Finally, China contends that the ITC ignored the fact that “automation” helped “increas[e] productivity” for the industry during the period.<sup>648</sup> Again, the ITC considered whether the industry’s productivity had improved over the period and concluded that the industry’s productivity “fluctuated” over the period but ultimately fell to its “lowest level in 2008.”<sup>649</sup> In fact, the industry’s productivity fell in each year of the period of investigation, with the exception of 2007, when there was a slight improvement in that factor.<sup>650</sup> Since these declines generally corresponded with the increases in the volumes of the subject imports, the ITC reasonably concluded that “automation” had not improved the industry’s productivity during the period and that the increase in subject imports correlated with the overall decline in the industry productivity during the period.<sup>651</sup>

328. In sum, it is not true that the ITC listed and then summarily dismissed each of these factors, as China argues. Instead, in its analysis, the ITC specifically considered each factor, addressed the possible impact of most factors in an appropriate manner, and then reasonably concluded that the factors were not themselves a cause of injury or failed to sever the causal link between the subject imports and material injury. The ITC’s analysis was fully consistent with

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<sup>645</sup> Similarly, China’s argument that the ITC failed to discuss the industry’s legacy costs is misplaced, because the ITC explicitly noted in its price-suppression analysis that the industry’s overall costs, including its “selling and administrative costs,” rose over the period, and that underselling by the subject imports prevented the U.S. producers from passing these costs onto their customers, thus resulting in a “cost-price” squeeze. ITC Report, p. 24. Exhibit US-1. Since legacy costs would, to the extent appropriate, be included within the industry’s sales and general administrative costs, they are clearly a component of the ITC’s cost analysis. See *EC - Pipe Fittings (AB)*, paras. 151-166.

<sup>646</sup> China First Submission, para. 356.

<sup>647</sup> ITC Report, p. 22. Exhibit US-1.

<sup>648</sup> China First Submission, para. 356.

<sup>649</sup> ITC Report, pp. 17 and 18. Exhibit US-1.

<sup>650</sup> ITC Report, Table C-1. Exhibit US-1.

<sup>651</sup> ITC Report, p. 29. Exhibit US-1.

the text of the Protocol and reflects a reasoned approach to the consideration of these issues. Nothing further was required.

**iv. The ITC Is Not Required by The Protocol To Perform a Cumulated Analysis of the Injurious Effect of These Other Factors**

329. Finally, China argues that each of these factors, including declining demand, the industry’s “business strategy,” and such other factors as raw materials costs and improved productivity, “operate collectively” to harm the industry and that the ITC erred by not considering their effects on a cumulated basis.<sup>652</sup> In making this argument, China ignores the fact that the Protocol itself imposes no obligation on the competent authority to perform an analysis of such other factors at all, and certainly does not require the authority to conduct an analysis of the effects of these factors on a cumulated basis.

330. Moreover, China’s argument ignores the fact that, even under the Antidumping Agreement, the Appellate Body has stated that an antidumping authority is not required to examine the collective impact of other causal factors.<sup>653</sup> Although that Agreement, unlike the Protocol, includes language contemplating that an authority should consider the injurious effects of other causal factors in its analysis, the Appellate Body stated that this specific language:

does not compel, *in every case*, an assessment of the *collective* effects of other causal factors, because such an assessment is not always necessary to conclude that injuries ascribed to dumped imports are actually caused by those imports and not by other factors.<sup>654</sup>

In other words, even when a particular agreement requires an analysis of other injury factors, the Appellate Body has refused to require the investigating authorities to examine the effects of those factors on a cumulative basis. Given that China has failed to establish why it would be necessary to conduct such an analysis here and that the Protocol does not require any analysis of these factors, the Panel should reject China’s interpretation of the Protocol on this matter as well.

**c. Conclusion**

In sum, despite the fact that the Protocol does not so require, the ITC reasonably assessed the extent to which other factors severed the causal link between the subject imports and material injury. It explained in some detail why it concluded that declining demand in 2008 and the industry’s “business strategy” did not explain why the industry’s condition was deteriorating

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<sup>652</sup> China First Submission, paras. 357-358.

<sup>653</sup> *EC – Pipe Fittings (AB)*, para. 192.

<sup>654</sup> *EC – Pipe Fittings (AB)*, para. 191.

throughout the period of investigation. Moreover, it discussed the other factors cited by China in its causation analysis to the extent such discussion was necessary. Its analysis was reasoned and in compliance with the Protocol, and China’s arguments to the contrary are unfounded.

**D. The United States Applied a Remedy Consistent with the Requirements Set Out in Paragraphs 16.3 and 16.6 of the Protocol of Accession**

331. The preceding sections show that the United States met the criteria for invoking the transitional safeguard mechanism with the ITC’s finding that rapidly increasing imports were a cause of market disruption. Subsequent to that determination, the ITC solicited comments on an appropriate remedy, held a hearing on that subject, and examined conditions of competition, demand conditions, domestic supply conditions, and import supply conditions. As a result, it determined that increasing tariffs on Chinese tires by 55 percent in the first year, 45 percent in the second year, and 35 percent in the third year “will remedy the market disruption we find to exist,” and recommended that the President impose that relief. USTR then solicited further comments from interested parties and held its own hearings. Based on this process, President Obama decided to reduce the remedy recommended by the ITC to additional tariffs on tires from China of 35 percent in the first year, 30 percent in the second year, and 25 percent in the third year. Through this process, the United States ensured that, as required by paragraphs 16.3 and 16.6, the measures were imposed no more and for no longer than necessary to prevent or remedy market disruption.

332. China attempts to prove that the U.S. tariff increases were both too high and too long in duration to satisfy this standard. Its first argument on both counts is to cross-reference its arguments against the ITC’s rapidly increasing imports and causation findings.<sup>655</sup> The preceding analysis has shown that China’s arguments in these areas should fail, and we will not address them further in this section of this submission.

333. China also notes that the ITC considered the effect that increased tariffs would have on the U.S. industry, and asserts that in doing so, it went beyond the extent necessary to remedy market disruption caused by rapidly increasing imports. This reasoning runs directly contrary to the Protocol, which defines market disruption, in part, in terms of material injury or threat of material injury to the domestic industry. Therefore, a Member seeking to comply with the authorization under paragraph 16.3 of the Protocol to “withdraw concessions or otherwise limit imports only to the extent necessary to prevent or remedy such market disruption” is entitled to consider the effect on the domestic industry. Otherwise, it cannot know whether its remedy properly addresses market disruption in the sense of material injury. Thus, China’s arguments against the temporary tariff increases imposed by the United States fail to demonstrate any inconsistency with paragraph 16.3 or 16.6 of the Protocol.

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<sup>655</sup> China First Submission, paras. 379 and 417.

**1. The United States Applied Additional Duties Only to the Extent Necessary to Remedy the Market Disruption from Chinese Imports Consistent with Paragraph 16.3 of the Protocol of Accession**

334. China, as the complaining party, bears the burden of proof to establish any violation of paragraph 16.3 of the Protocol. China puts forth two arguments to meet this burden – that the ITC impermissibly considered the effect of the tariffs on the domestic industry and disregarded testimony from domestic producers that no remedy was necessary. Neither is valid. The potential effect of a safeguard measure on the domestic industry is not merely permissible; it is essential to any consideration of whether the safeguard prevents or remedies market disruption, which is, after all, defined in terms of material injury caused to the domestic industry. In addition, China is wrong to assert that the ITC “disregarded” the views of some in U.S. industry or should have given more weight to those views.

**a. A Remedy Must by Necessity Focus on the Effect on the Domestic Industry**

335. Critical points of the legal standard are not in dispute. The United States agrees with China that any remedy under paragraph 16.4 of the Protocol may only remedy the material injury that results from the rapidly increasing imports from China. The United States also agrees that the Appellate Body’s analysis of the phrase “no more than the extent necessary to prevent or remedy serious injury” in Article 5.1 of the Safeguards Agreement can provide useful reasoning in interpreting the similar phrase in paragraph 16.3 of the Protocol. In this regard, the United States notes that in *Korea – Dairy Safeguard*, the Appellate Body explained that “the first sentence of Article 5.1 imposes an *obligation* on a Member applying a safeguard measure to ensure that the measure applied is not more restrictive than necessary to prevent or remedy serious injury and to facilitate adjustment.”<sup>656</sup> (Emphasis in original). In *US – Line Pipe*, the Appellate Body found that this sentence “sets the maximum permissible extent for the application of a [global] safeguard measure.”<sup>657</sup> The Appellate Body went on to explain that the words “only to the extent necessary” indicate that the provision has “a limited objective” and “draw[ ] the outer boundary of that limited objective – the maximum permissible “extent” to which a safeguard measure may be applied.”<sup>658</sup> The Appellate Body concludes that “the phrase ‘only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment’ in Article 5.1, first sentence, must be read as requiring that the safeguard measures may be applied only to the extent that they address serious injury attributed to increased imports.”<sup>659</sup>

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<sup>656</sup> *Korea – Dairy Safeguard (AB)*, para. 103.

<sup>657</sup> *US – Line Pipe (AB)*, para. 245.

<sup>658</sup> *Ibid.*, para. 246.

<sup>659</sup> *US – Line Pipe (AB)*, para. 260.

336. However, the United States does not agree with China’s conclusion that the Appellate Body’s findings signify that “the remedy measure provision has an exceedingly narrow reach.”<sup>660</sup> Although the authority to impose a measure is circumscribed by the extent of the injury caused by the relevant imports, where imports have a broad injurious effect, the authority would be correspondingly broad. It is also significant that paragraph 16.3 of the Protocol provides that a Member facing rapidly increasing imports from China that cause market disruption is “free, in respect of such products, to withdraw concessions or otherwise to limit imports. . . .” This authority grants a Member latitude in crafting an appropriate remedy.

337. It is also important to note that the evaluation of whether a safeguard approaches or passes the permissible extent cannot be a matter of scientific precision. As the working group that reviewed the U.S. Article XIX measure on felt hats and hat bodies under the GATT 1947 noted, “it is impossible to determine in advance with any degree of precision the level of import duty necessary to enable the United States industry to compete with overseas suppliers in the current competitive conditions of the United States market.”<sup>661</sup> This observation remains true today. Although economic modeling allows a generalized evaluation of market conditions, it cannot measure with any precision the effect of rapidly increasing imports or the effect of measures designed to remedy their effect.

338. China argues that the United States failed to comply with this standard because “[t]he USITC frequently asserted that it took into account the need to limit the remedy in various respects, but never actually did so.”<sup>662</sup> The only evidence China puts forward in support of this criticism is to quote statements like the following:

We believe that the tariffs will significantly reduce subject imports and boost U.S. industry sales and prices, resulting in increasing profitability. This profitability will lead to the preservation of jobs and the creation of new ones, as well as encourage investment.<sup>663</sup>

and

This increase in the tariff would significantly improve the competitive position of the domestic industry, increasing domestic production, shipments, and employment and restoring the domestic industry to at least a modest level of

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<sup>660</sup> China First Submission, para. 368.

<sup>661</sup> *US – Fur Hats*, para. 35. The Appellate Body cited this report as part of the GATT 1947 *acquis* in *US – Line Pipe (AB)*, para. 174.

<sup>662</sup> China First Submission, para. 384.

<sup>663</sup> China Written Submission, para. 383, *quoting* ITC Determination, p. 30.

profitability. The increase should accomplish this by reducing the quantity of subject imports and raising their price in the U.S. market.<sup>664</sup>

According to China, these types of statement demonstrates that the ITC assumed that “increasing imports from China were entirely to blame for the condition of the domestic industry” and that “[t]he focus remained entirely on the benefits to the domestic industry and not on addressing the specific market disruption found to exist.”<sup>665</sup>

339. These statements do not have the meaning China ascribes to them. They describe the effect the ITC expects the chosen measure to have with respect to the material injury on the industry. The ITC expects that the increased tariffs will “reduce subject imports” (*i.e.* limit imports of subject tires from China) and address the material injury suffered by the domestic industry. Nowhere does the ITC suggest that the proposed tariffs will address all of the injury to the domestic industry, or return it to its condition in 2004. They instead show the expectation of “modest” profitability and increases in various indicators of domestic performance.

340. China’s criticism of the “focus” on the benefits to the domestic industry and not on “specific market disruption” simply makes no sense. Paragraph 16.4 defines market disruption in terms of “material or threat of material injury” of which rapidly increasing imports from China are a significant cause.” It further requires a Member to examine “objective factors, including the volume of imports, the effect of imports on prices for like or directly competitive articles, and the effect of such imports on the domestic industry producing like or directly competitive products.” Thus, the effect of imports on prices and on the domestic industry are crucial elements in the existence of market disruption. In this case, the ITC found that the market disruption to the domestic industry consisted of declining capacity, capacity utilization, profitability, and employment. It is difficult to imagine how it could “address[] the specific market disruption found to exist” without examining the potential benefits of a remedy to these identified effects of increased imports. Therefore, China’s criticism is invalid as a legal matter.

341. The Panel should also note that, contrary to the impression China’s arguments might create, the ITC’s analysis went far beyond the summary statements quoted by China. Part C<sup>666</sup> of the remedy determination analyzes demand conditions, domestic supply conditions, and import supply conditions. It notes the underselling by subject imports<sup>667</sup>, unused capacity of U.S. producers<sup>668</sup>, unused capacity of Chinese producers<sup>669</sup>, and the fact that non-subject imports (*i.e.*

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<sup>664</sup> China First Submission, para. 384, *quoting* ITC Determination, p. 35.

<sup>665</sup> China First Submission, paras. 382-384.

<sup>666</sup> In Part B, the ITC sets out the elements that Section 421(g)(2)(D) of the U.S. statute requires them to address in their report with respect to remedy.

<sup>667</sup> ITC Report, page 32. Exhibit US-1.

<sup>668</sup> ITC Report, page 33. Exhibit US-1.

<sup>669</sup> ITC Report, page 33. Exhibit US-1.



imports from third countries) held a fairly consistent share of the U.S. market during the period of investigation.<sup>670</sup> Part D of the remedy recommendation analyzes the proposed tariff increase and how it is the “most appropriate remedy to address the market disruption caused by rapidly increasing imports from China,” making clear that it addresses only the material injury caused by Chinese imports. One particular manifestation of this, is the ITC’s discussion of why it rejects the remedy proposed by petitioners (a quota of 21 million tires in the first year, with increases of 5 percent for each of the following two years, administered at the 10-digit HTS level). The ITC explains that the proposed quota would be equivalent to a 65 *ad valorem* tariff, “which we view to be higher than necessary to remedy the market disruption we have found.”<sup>671</sup> The ITC is clearly calibrating its remedy to ensure that it addresses the injury caused by the increasing Chinese imports. Part E of the remedy recommendation addresses the short- and long-term effects of the recommended remedy, explaining that economic modeling indicates that the proposed 55 percent tariff would likely reduce shipments of Chinese tires by 38.2 to 58.4 in the first year. The ITC then explains how this reduction in shipments will have an effect on domestic and non-subject imports, on their prices, and eventually on the domestic industry’s revenue.<sup>672</sup>

342. Chairman Aranoff’s separate views on remedy<sup>673</sup> likewise demonstrate a focus on addressing the material injury caused by Chinese imports. Beginning at the top of page 40, Chairman Aranoff sets out the analytical framework she has used. She explains:

In determining what remedy to propose, I took into account the nature of the market disruption that I have found to exist - specifically the rapid increase in imports of subject tires from China, the large absolute volume of those imports, and the underselling by the imports. It is my view that, in order to be effective, a remedy must address and alleviate these specific elements of market disruption, by reducing the volume of imports from China in the U.S. market and raising the prices of the remaining volume of such imports in an effective way and for an effective period of time.<sup>674</sup>

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<sup>670</sup> ITC Report, page 34. Exhibit US-1.

<sup>671</sup> ITC Report, page 36 and footnote 200.

<sup>672</sup> See also, Staff Remedy Memorandum to the Commissioners, June 19, 2009, in particular Table 3. Exhibit US-20.

<sup>673</sup> All four commissioners voting in the affirmative on the issue of market disruption proposed the same remedy. Three commissioners presented joint views on remedy. Chairman Aranoff chose to present separate views on the issue. Section 2451(g)(2)(C) allows for commissioners to present such views. Exhibit US-3. In the context of the requirement in the Safeguards Agreement for the competent authority to publish a report on all pertinent issues of fact and law, the Appellate Body has noted that nothing in the Safeguards Agreement precludes the possibility of multiple findings instead of a single finding in order to support a determination. *US – Steel Safeguards (AB)*, para. 414. The Appellate Body further stated that “a panel must ascertain whether a reasoned and adequate explanation for the USITC’s determination is contained in the report, even if only in one of the Commissioner’s individual findings.” *Id.* para. 415.

<sup>674</sup> ITC Report, page 40.

She then explains how the proposed remedy meets these elements. In addition, she notes that the recommended remedy is “not intended to address the effects of the current recession or to restore the domestic industry to a level of shipments and profitability that prevailed in any particular year.”<sup>675</sup>

343. Thus, the ITC’s remedy recommendation in its totality belies the impression China attempts to create. We have demonstrated that the ITC conducted a detailed analysis, based on the facts on the record and using economic tools available, to craft a remedy that would only address the injury caused by Chinese imports. China is simply wrong to assert that the ITC did not distinguish between the injury caused by Chinese imports and other factors.

344. China also asserts that the ITC’s remedy findings were inconsistent with paragraph 16.3 because they disregarded the testimony from U.S. producers that they were not materially injured by Chinese imports and would not change their strategy or behavior if there were to be a remedy.<sup>676</sup> This critique of the ITC’s analysis is again misguided.

345. First, it is telling that in making this argument, China relies on the views of the dissenting Commissioners. However, their reasoning reveals that there was a difference of opinion among the Commissioners as to the appropriate weight to give to the evidence on this issue, with the two dissenters believing that more weight should have been given to the views presented by some of the U.S. producers. However, this is a matter for the fact-finder – the ITC as whole. Four Commissioners evaluated the evidence differently. The ITC’s determination before this Panel is that reflected in the majority opinion.

346. In fact, it is clear, even from the discussion by the dissenting Commissioners, that U.S. producers’ views on this issue were hardly unanimous, and therefore needed to be evaluated, along with the other evidence of record, by the fact finder – the ITC.” Only 4 out of 10 U.S. producers responded “no” to the question of whether the increased Chinese imports were the cause of material injury. Four said they were not in a position to answer. The rest took no position or did not respond.<sup>677</sup> Some supported the petition, and others took no position.<sup>678</sup> To a great degree, China’s argument here is another version of its causation arguments, which we have demonstrated are incorrect.

347. China also suggests that the fact that U.S. producers did not provide specific restructuring plans implies a deficiency in the ITC’s analysis.<sup>679</sup> It should first be noted that the Protocol does

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<sup>675</sup> ITC Report, page 41.

<sup>676</sup> China First Submission, para. 388.

<sup>677</sup> ITC Report, p. 65, footnote 125. Exhibit US-1.

<sup>678</sup> Id.

<sup>679</sup> China First Submission, para. 414.

not require the filing or consideration of industry restructuring plans in the analysis of market disruption or of an appropriate remedy. Therefore, this fact is irrelevant as to whether the United States has complied with its obligations under the Protocol with respect to the appropriate “extent” of the remedy. In any case, it is not true that the ITC disregarded the evidence before it. The ITC notes that even though no plans were submitted, “other information in the record indicates that domestic producers have put plant and equipment upgrades on hold pending more favorable market opportunities.”<sup>680</sup>

348. Finally, whether individual producers said they would or would not change their business plans is not determinative of whether the proposed remedy was “to the extent necessary to remedy” the market disruption found with respect to the industry as whole. As we have explained above, a remedy must by necessity seek to address the material injury caused on the industry. This means that the remedy must seek to address the various factors that indicate the health of the industry “as a whole”, as it has been effected by the market disruption found. The impact on individual companies will necessarily vary, depending on individual company facts.

349. Thus, China has failed to meet its burden of proof to demonstrate that the ITC recommended remedy failed to comply with paragraph 16.3. It is noteworthy that after soliciting further information from interested parties and providing for a hearing, President Obama determined that the most appropriate action to remedy the market disruption found by the ITC was an additional duty set at 35 percent for the first year (instead of a 55 percent *ad valorem* duty). In addition, the President determined that, although not required by the transitional mechanism or U.S. law, the additional duty should be reduced by five percentage points in the second and third years of the remedy, resulting in each case in additional tariffs lower than those recommended by the ITC. The only argument China makes against the final remedy imposed by the United States is that “President Obama’s determinations apparently assume the USITC had provided the necessary analysis, when in fact the USITC had not done so.”<sup>681</sup> We have shown that China has failed to meet its burden with regard to its challenge to the ITC’s remedy analysis. Therefore, its challenge to the measure actually applied by President Obama must also fail.

## **2. The U.S. Measure is Consistent with Paragraph 16.6 of the Protocol**

350. China, as the complaining party, bears the burden of proof to establish any violation of paragraph 16.6 of the Protocol, which provides that “[a] WTO Member shall apply a measure pursuant to this Section only for such period of time as may be necessary to prevent or remedy the market disruption.” China’s arguments for finding a violation of this provision essentially duplicate those advanced for the paragraph 16.3 claim – that the ITC impermissibly considered the effect of the tariffs on the domestic industry and disregarded testimony from domestic

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<sup>680</sup> ITC Report, p. 36. Exhibit US-1.

<sup>681</sup> China Written Submission, para. 391.

producers that no remedy was necessary. These arguments are no more valid in this context than they were with regard to the paragraph 16.3 claim.

351. There is at least no dispute as to the ordinary meaning of this requirement – that any safeguard measure must be limited to the period of time as is necessary to prevent or remedy the material injury caused by rapidly increasing Chinese imports.<sup>682</sup> However, the United States does not agree with China’s efforts to elevate the requirement. China asserts that the Safeguards Agreement, the Anti-dumping Agreement, and the SCM Agreement have analogous duration requirements, which demonstrate that “any remedy imposed must be narrowly tailored in terms of duration.”<sup>683</sup> This is simply untrue. The Anti-dumping Agreement and the SCM Agreement allow the imposition of relief as long as the injurious dumping or subsidization continues.

352. China also attempts to heighten the burden by arguing that a remedy measure may remain in place “only for the exact amount of time” or “for that period of time specifically found” to address the market disruption.<sup>684</sup> This level of exactitude is neither required nor possible. The Protocol requires competent authorities to make decisions regarding safeguard measures based on evidence and formal proceedings providing for participation by interested parties. Those authorities cannot know at the time of taking a measure the “exact amount of time” it will be necessary. In fact, the Working Party Report recognized that a Member taking a safeguard need not identify an exact time period by explicitly allowing them to extend a measure based on a finding that “action continued to be necessary to prevent or remedy market disruption.”<sup>685</sup>

353. China also fails to give appropriate weight to the remaining elements of paragraph 16.6, which allow China to suspend concessions substantially equivalent to any safeguard measure two years after its application if there was a relative increase in imports and three years after application if there was an absolute increase. These indicate that the negotiators of the Protocol envisaged safeguard measures remaining in place for at least three years if there was an absolute increase in Chinese imports, as was the case with regard to tires, or even longer in the case of an extension under paragraph 246(f) of the Working Party Report. China attempts to dismiss these provisions as “rights that China has under certain circumstances,”<sup>686</sup> but that does not diminish their utility as context for the first sentence of paragraph 16.6 or as an indication of the expectations of the negotiators of the Protocol.

354. China also errs in its application of the legal standards to the facts. The ITC found that Chinese imports had increased both in absolute terms and in relative terms, and the United States applied a safeguard measure for three years, as envisaged in the third sentence of paragraph 16.6

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<sup>682</sup> China First Submission, para. 395.

<sup>683</sup> China First Submission, para. 401.

<sup>684</sup> China First Submission, paras. 397 and 405.

<sup>685</sup> Working Party Report, para. 346(f).

<sup>686</sup> China First Submission, para. 399.

of the Protocol. China argues, as it did with regard to its paragraph 16.3 claim, that the ITC’s rationale “focuses entirely on the condition of the domestic industry and the time it needs to adjust,” a consideration that in China’s view “is irrelevant.”<sup>687</sup> As the United States explained above in Section D.1, this assertion is incorrect as a matter of fact, as the ITC conducted a detailed analysis involving a number of factors. China’s argument is also legally wrong, as the effect of the remedy is not merely relevant, but critical, in understand whether it is “necessary to prevent or remedy market disruption.” For the reasons expressed in Section D.1, that logic applies to the duration of a measure as well as its other terms.

355. China also repeats its argument that the ITC did not give sufficient weight to the views of domestic producers who “had not provided specific restructuring plans.”<sup>688</sup> As explained in Section D.1, the ITC weighed all of the evidence before it, and considered that the evidence favoring its remedy outweighed the evidence cited by China against the remedy. China’s submission provides no basis to conclude that these substantive findings by the ITC were inconsistent with the Protocol.

356. Finally, China accuses the ITC of relying on “speculation” based on a quotation of part of one sentence stating that “we anticipate that the relief may encourage certain domestic producers to reconsider planned plant closures.”<sup>689</sup> China, however, draws the wrong conclusion. In the preceding paragraph, the ITC explained that it provided for progressive reduction of the level of the relief because “[w]e also expect the level of tariff protection that is necessary to offset market disruption to decrease as new investments and other adjustments are implemented.”<sup>690</sup> Thus, the subsequent statement that the industry “may reconsider” plant closures reflects only the understanding that there are many “investments or other adjustments” the industry might take, and that it was impossible to know with certainty at the time of its determinations which ones the prevailing business climate would allow.

357. Therefore, China has not provided the legal and factual evidence necessary to meet its burden of proof. The Panel should accordingly reject China’s claim with respect to consistency of the U.S. measure with paragraph 16.6 of the transitional mechanism.

#### **E. The Additional Duties Imposed by the United States on Subject Tires from China Are Not Inconsistent with Article I:1 of the GATT 1994**

358. China’s claim that the additional duties imposed by the United States on subject tires from China are inconsistent with U.S. obligations under Article I:1 of the GATT 1994 are dependent on a finding of inconsistency with U.S. obligations under the transitional mechanism.

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<sup>687</sup> China First Submission, para. 412.

<sup>688</sup> China First Submission, para. 414.

<sup>689</sup> China First Submission, quoting ITC Determination, p. 36.

<sup>690</sup> ITC Determination, pp. 35-36.

359. China has failed to demonstrate that the United States has acted inconsistently with its obligations under the transitional mechanism of the Protocol of Accession. The transitional mechanism provides for the application of measures only against imports from China. Therefore this claim must be rejected.

**F. The Additional Duties Imposed by the United States on Subject Tires from China Are Not Inconsistent with Article II:1(b) of the GATT 1994**

360. China's claim that the additional duties imposed by the United States on subject tires from China are inconsistent with U.S. obligations under Article II:1(b) of the GATT 1994 are dependent on a finding of inconsistency with U.S. obligations under the transitional mechanism.

361. China has failed to demonstrate that the United States has acted inconsistently with its obligations under the transitional mechanism of the Protocol of Accession. The transitional mechanism provides for the application of measures, including the limitation of imports through the imposition of additional duties on imports from China. Therefore this claim too must be rejected.

**V. CONCLUSION**

362. For the reasons set forth above, the United States requests that the Panel reject China's claims in their entirety.